16-54

No. 16-___

IN THE

Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal law, the Model Penal Code, and the laws of forty-three states and the District of Columbia, consensual sexual intercourse between a twenty-one-year-old and someone almost eighteen is legal. Seven states have statutes criminalizing such conduct.

The question presented is whether a conviction under one of those seven state statutes constitutes the "aggravated felony" of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) of the Immigration and Nationality Act – and therefore constitutes grounds for mandatory removal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan Esquivel-Quintana respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Pet. App. 1a, is reported at 810 F.3d 1019 (6th Cir. 2016). The opinion of the Board of Immigration Appeals, Pet. App. 28a, is reported at 26 I. & N. Dec. 469 (B.I.A. 2015). The decision of the Immigration Judge is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 15, 2016. The court of appeals denied a timely petition for rehearing en banc on April 12, 2016. Pet. App. 43a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43), provides in relevant part: "The term 'aggravated felony' means – (A) murder, rape, or sexual abuse of a minor."

Cal. Penal Code § 261.5 provides in relevant part:

> (a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years . . . .

. . .

(c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

(d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

Other relevant provisions of the U.S. Code – specifically, 18 U.S.C. §§ 2241, 2243, and 3509 – are reproduced at Pet. App. 44a-66a.

STATEMENT OF THE CASE

The Board of Immigration Appeals (BIA) has deemed conduct that is *legal* under federal law, the Model Penal Code, and the laws of forty-three states and the District of Columbia to be an "aggravated felony" under the Immigration and Nationality Act (INA). Specifically, the BIA has held that the INA's subsection categorizing "sexual abuse of a minor" as an aggravated felony covers not only convictions for sexually abusive conduct toward victims under sixteen but also convictions in the seven states that proscribe consensual sex between a twenty-one-year-old and someone under eighteen. Two federal courts of appeals have expressly rejected this position and

another circuit has adopted reasoning that would demand it do the same. But four others, including the Sixth Circuit in a divided opinion here, have accepted the BIA's view.

A. Legal Background

1. The INA subjects lawful permanent residents who are convicted of certain crimes to adverse immigration consequences, including removal. *See* 8 U.S.C. § 1227(a). These noncitizens may typically seek discretionary relief to remain in the United States. *See id.* §§ 1158, 1182(h), 1229b, 1229c.

But relief from removal is not an option for lawful permanent residents convicted, under state or federal law, of a crime the INA classifies as an "aggravated felony." Lawful permanent residents (and other lawfully present noncitizens) convicted of an "aggravated felony" are ineligible for virtually all forms of discretionary relief from removal. *See id.* §§ 1158(b)(2) (no asylum), 1182(h) (no waiver), 1229b(a)(3) (no cancellation of removal), 1229c(a)(1) (no voluntary departure). And once removed from the United States, an "aggravated felon" is ineligible for readmission or naturalization. *Id.* § 1182(a)(9)(A).

2. The INA contains a list of types of criminal offenses – such as murder and drug trafficking – that constitute "aggravated felonies." 8 U.S.C. § 1101(a)(43). State laws defining certain crimes, however, sometimes differ from one another in their particulars, and from their federal analogs as well. Questions thus frequently arise concerning whether a conviction under a state law proscribing conduct seemingly similar to that referenced in the INA qualifies as an "aggravated felony."

To answer these questions, this Court employs the "categorical approach." Under that approach, courts must first determine the elements of the aggravated felony's "generic" definition of the crime. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). This definition is derived from the contemporary, "generic sense in which the term is now used in the criminal codes of most States," federal law, and the Model Penal Code. *Taylor v. United States*, 495 U.S. 575, 598 (1990). If the elements of the state statute of conviction fall within the generic definition, then the conviction constitutes an aggravated felony. *Id.* But if the state statute is "overbroad" – that is, if it criminalizes conduct that the generic federal definition does not – then a conviction under that statute is not an aggravated felony. *Descamps v. United States*, 133 S. Ct. 2276, 2292 (2013). Under this approach, then, the "facts underlying the case" are irrelevant; courts look solely to "the least of the acts criminalized" by the state statute and compare them to the elements of the generic federal definition. *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010) (internal quotation mark and alteration omitted)).

Taylor illustrates the categorical approach at work. There, this Court considered whether a state burglary conviction satisfied the generic definition of "burglary." 495 U.S. at 579-80. Looking to criminal codes across the country and the Model Penal Code, this Court concluded that the "contemporary meaning of burglary" required that the perpetrator unlawfully enter into a "building or structure" with intent to commit a crime. *Id.* at 598-99 & n.8. But the

state statute under which the defendant had been convicted criminalized not only entries into buildings and structures but also unauthorized entries into vessels and railroad cars. *Id.* at 599. Accordingly, the state statute swept more broadly than the generic definition. And so, the defendant's conviction – regardless of the actual facts that led to it – could not be treated as one for "burglary" under the federal statute at issue. *Id.* at 602.[1]

Through analyses like this, the categorical approach brings uniformity to the law and relieves courts of the arduous – and sometimes impossible – task of discerning the exact facts underlying prior convictions. *Taylor*, 495 U.S. at 601; *see also Moncrieffe*, 133 S. Ct. at 1693 & n.11. The categorical approach's method of "err[ing] on the side of underinclusiveness," *Moncrieffe*, 133 S. Ct. at 1693, also "promote[s] efficiency, fairness, and predictability in the administration of immigration law," *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

B. Factual and Procedural Background

1. When petitioner Juan Esquivel-Quintana was twelve years old, he moved to the United States with his parents and became a lawful permanent resident.

---

[1] There are more complicated variations of the categorical approach, such as the "modified categorical approach" and tools for dealing with "divisible" state laws. *Mathis v. United States*, 136 S. Ct. ___ (2016) (slip op. at 3-4). But this case involves the "straightforward" version of the approach where this Court discerns the elements of the "generic" offense referenced in the INA and "then lines up [the state-law] crime's elements alongside those of the generic offense[]" to see if the former are broader. *Id.* at 2-3.

Pet App. 3a; Certified Administrative Record (CAR) 217. His parents, four siblings, and much of his extended family currently live in the United States. CAR 217-18. All of them are either lawful permanent residents or U.S. citizens. *Id.*

Esquivel-Quintana had no trouble with the law until 2009, when, while living outside of Sacramento, California, he was charged with violating Cal. Penal Code § 261.5(c). That statute is among the strictest laws in the Nation proscribing sexual intercourse with persons who have not attained a certain age; the statute criminalizes sex with an individual "under the age of 18 years" whenever the age difference between the parties is more than three years. Cal. Penal Code § 261.5(c). According to the State's charging papers, Esquivel-Quintana had consensual sex with his sixteen-year-old girlfriend while he was twenty and twenty-one years old. CAR 66-67, 214.

The INA defines "aggravated felony" to include "murder, rape, or *sexual abuse of a minor.*" 8 U.S.C. § 1101(a)(43)(A) (emphasis added). Before Esquivel-Quintana was charged, the Ninth Circuit held that a conviction under Cal. Penal Code § 261.5(c) does not constitute "sexual abuse of a minor." *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1160 (9th Cir. 2008) (en banc). Surveying federal and state laws on the subject, the Ninth Circuit determined that the generic definition of "sexual abuse of a minor" requires victims to be under sixteen and at least four years younger than the perpetrator. *Id.* at 1152-55. The least of the acts criminalized under Cal. Penal Code § 261.5(c) – consensual sex between a twenty-one-year-old and a person just shy of eighteen – falls outside of those generic elements.

Against this backdrop, Esquivel-Quintana pleaded no contest to the Cal. Penal Code § 261.5(c) charge. CAR 209. He was sentenced to ninety days in jail and five years' probation. Pet. App. 29a; CAR 209.

After completing his jail term, Esquivel-Quintana moved from California to Michigan to be closer to his family. CAR 217-18. In Michigan, as under federal law, the conduct underlying Esquivel-Quintana's California conviction is not a crime. *See* 18 U.S.C. § 2243; Mich. Comp. Laws § 750.520d.

2. The Government arrested Esquivel-Quintana in Michigan and initiated removal proceedings against him. The Government alleged that his California conviction constituted the "aggravated felony" of "sexual abuse of a minor." Pet. App. 3a.

Esquivel-Quintana urged the Immigration Judge (IJ) to follow the Ninth Circuit's reasoning in *Estrada-Espinoza* and declare that his conviction did not constitute "sexual abuse of a minor" under Section 1101(a)(43)(A). CAR 154. The Government reminded the IJ she was sitting within the Sixth Circuit and urged her to reject the Ninth Circuit's analysis. *Id.* 189-91. Specifically, the Government asked the IJ to hold that "sexual abuse of a minor" encompasses sexual activity with "anyone under the age of 18 years old." *Id.* 190. The IJ adopted the Government's position and ordered Esquivel-Quintana removed from the United States. *Id.* at 158, 195-96; Pet. App. 3a.

3. A three-member panel of the BIA affirmed. The BIA, like the IJ, began by acknowledging that a conviction under Cal. Penal Code § 261.5(c) does not constitute "sexual abuse of a minor" in the Ninth Circuit. Pet. App. 34a (citing *Estrada-Espinoza*, 546

F.3d at 1159). But the BIA stressed that it was "not bound" in this case by Ninth Circuit precedent. *Id.* 34a. The BIA then concluded that "outside of the Ninth Circuit," a conviction under Cal. Penal Code § 261.5(c) constitutes the "aggravated felony" of "sexual abuse of a minor." *Id.* 35a, 41a-42a.

In holding that a conviction under Cal. Penal Code § 261.5(c) necessarily falls within the generic definition of "sexual abuse of a minor," the BIA purported to apply the categorical approach. Pet. App. 33a. But the BIA ignored the fact that only seven states criminalize consensual sex between a twenty-one-year-old and someone almost eighteen, as California does. *See* Pet. App. 67a-68a (collecting state statues). And the BIA never asked whether federal law or the Model Penal Code criminalizes such conduct. If it had, it would have been forced to acknowledge that the federal statute criminalizing "sexual abuse of a minor" does not prohibit consensual sex with someone sixteen or older. 18 U.S.C. § 2243(a)(1). Nor does the Model Penal Code. *See* Model Penal Code § 213.3(1)(a) (Am. Law Inst. 1962).

Instead, the BIA looked to 18 U.S.C. § 3509, a statute that establishes procedural rules for child witnesses in criminal trials where the child has been a victim of, among other things, "sexual abuse." This statute defines "child" as someone under eighteen. *Id.* § 3509(2). Consequently, the BIA held that the word "minor" in Section 1101(a)(43)(A) must refer to someone under eighteen. Pet. App. 31a.

The BIA acknowledged that consensual sex involving sixteen- or seventeen-year-olds is not necessarily "abusive" – another requirement for

"sexual *abuse* of a minor." Pet. App. 38a-39a (emphasis added). But the BIA thought that such conduct is abusive "in certain circumstances," such as when "a 16-year-old high school student" has consensual sex with "his or her school teacher." *Id.* 35a & n.4. From this, the BIA concluded that "outside the Ninth Circuit," the generic definition of "sexual abuse of a minor" covers statutes criminalizing sex with someone under eighteen, so long as there is "meaningful" age differential between the two participants. *Id.* 35a, 39a.

Comparing those generic elements to California law, the BIA held that convictions under Cal. Penal Code § 261.5(c) necessarily constitute "sexual abuse of a minor." The California law criminalizes sex between someone under eighteen (the BIA's definition of "minor") and another person at least three years older – an age differential the BIA found "sufficient" to be "meaningful." Pet. App. 41a-42a.

4. A divided panel of the Sixth Circuit denied Esquivel-Quintana's petition for review. It noted that "[t]he Second, Third, and Seventh Circuits" have held that "sexual abuse of a minor" means engaging in a sexual act with anyone under eighteen, while "[t]wo circuits" – the Ninth and the Fourth – "have reached a different conclusion." Pet. App. 5a, 14a. The Sixth Circuit "join[ed]" the former camp. *Id.* 15a.

Like the BIA, the Sixth Circuit never canvassed state law or the Model Penal Code to ascertain a generic, contemporary definition of "sexual abuse of a minor." Nor did the majority ascribe much significance to the fact that the federal criminal code limits its definition of that offense to situations where the minor is under sixteen and at least four years

younger than the defendant. *See* Pet. App. 12a (referencing 18 U.S.C. § 2243). Instead, the majority simply declared that, because the INA does not explicitly cross-reference the federal criminal code or otherwise define the phrase "sexual abuse of a minor," the generic definition of that crime is "ambiguous." Pet. App. 11a.

Faced with that perceived ambiguity, the majority turned to whether to apply the framework in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which requires courts in certain settings to defer to agencies' "reasonable construction[s]" of ambiguous statutes. *Id.* at 840. The Sixth Circuit saw "compelling reasons" to apply the rule of lenity instead of *Chevron* – and thus to resolve the ambiguity here in Esquivel-Quintana's favor. Pet. App. 8a. But it did not do so. Citing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), an environmental case where this Court afforded deference to the EPA's interpretation of a statute having both civil and criminal applications, *see id.* at 703-04 & n.18, the majority asserted it was "requir[ed] . . . to follow *Chevron* in cases involving the Board's interpretations of immigration laws." Pet. App. 10a.

Applying *Chevron*, the Sixth Circuit found the BIA's conclusion that Cal. Penal Code § 261.5(c) falls within the generic crime of "sexual abuse of a minor" to be "permissible." Pet. App. 11a-15a. In the majority's view, the BIA reasonably defined the word "minor" according to the federal statute (18 U.S.C. § 3509) establishing rules for child witnesses in sexual abuse prosecutions. *Id.* 11a-12a. The majority

acknowledged that the federal *criminal* statute proscribing "sexual abuse of a minor," 18 U.S.C. § 2243, defines "minor" as someone between twelve and sixteen. *Id.* 13a. But the majority found that definition unacceptable because it does not cover "abuse against an eleven-year-old" – although the majority later conceded that a neighboring criminal statute, 18 U.S.C. § 2241, titled "aggravated sexual abuse," covers such conduct with persons under twelve. *Id.* 13a-14a.

Judge Sutton wrote an opinion concurring in part and dissenting in part, concluding that Esquivel-Quintana's conviction was not an "aggravated felony." He deemed this case a "classic occasion for applying the rule of lenity" because it involves an ambiguous statute with criminal and removal consequences, and this Court instructed in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that "whether we encounter [such a statute] in a criminal or noncriminal context, the rule of lenity applies." Pet. App. 21a, 24a (quoting *Leocal*, 543 U.S. at 11 n.8). Indeed, applying *Chevron* to statutes with both criminal and immigration consequences, he warned, "threatens a complete undermining of the Constitution's separation of powers," *id.* 22a (quoting *id.* 9a), and denies people "fair notice of criminal consequences," *id.* 22a. Finally, Judge Sutton saw nothing in *Babbitt* precluding this conclusion. The opinion in that environmental case, he explained, "expressly limits itself to 'facial challenges'" to agency regulations. *Id.* 24a.

5. The Sixth Circuit denied Esquivel-Quintana's petition for rehearing en banc. Pet. App. 43a.

REASONS FOR GRANTING THE WRIT

Federal courts of appeals are intractably divided over whether convictions under state statutes criminalizing consensual sex between a twenty-one-year-old and a person under eighteen constitute "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) of the INA. Indeed, they are divided over whether a conviction under the very state statute at issue in this case – Cal. Penal Code § 261.5(c) – constitutes "sexual abuse of a minor." Resolving this conflict is critical for millions of lawful permanent residents and other lawfully present noncitizens, as well as for litigants and courts struggling to discern in immigration and criminal proceedings when this provision of the INA applies. The Sixth Circuit's holding here is also wrong. Convictions under Cal. Penal Code § 261.5(c) and parallel state laws are not what Congress had in mind when it categorized "sexual abuse of a minor" as an "aggravated felony" under the INA. And even if there were any doubt on Section 1101(a)(43)(A)'s meaning, the Sixth Circuit should have resolved that ambiguity by ruling in favor of the noncitizen, not by deferring to the Board of Immigration Appeals (BIA).

I. The Courts of Appeals Are Intractably Divided Over Whether Convictions Under State Statutes Criminalizing Sex Between Twenty-One-Year-Olds and Persons Under Eighteen Constitute "Sexual Abuse of a Minor" Under the INA.

1. The courts of appeals are divided four-to-three over whether convictions under state statutes like Cal. Penal Code § 261.5(c) constitute "sexual abuse of a minor."

a. In addition to the Sixth Circuit's holding here, the Seventh Circuit has held that the BIA has permissibly concluded that convictions under Cal. Penal Code § 261.5(c) constitute "sexual abuse of a minor." *Velasco-Giron v. Holder*, 773 F.3d 774, 779-80 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015). The Seventh Circuit acknowledged that "most states treat persons 16 and older as adults for the purpose of defining sex offenses." *Id.* at 778. But it nonetheless concluded – over the dissent of Judge Posner – that the meaning of "sexual abuse of a minor" was ambiguous, and that "no matter how many states use a different age demarcation," the BIA's position is entitled to *Chevron* deference. *Id.* at 776-78. *But see id.* at 780-83 (Posner, J., dissenting).

The Second and Third Circuits likewise deem convictions for having sex with a person less than eighteen to constitute "sexual abuse of a minor." In *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001), the Second Circuit found Section 1101(a)(43)(A) to be ambiguous and then concluded that the BIA's definition of "minor" as someone under the age of eighteen is reasonable and entitled to *Chevron* deference. *Id.* at 55-60. And in *Restrepo v. Attorney General*, 617 F.3d 787 (3d Cir. 2010), the Third Circuit "agree[d]" with this analysis. *Id.* at 796.[2]

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[2] Although the Fifth Circuit has not squarely weighed in on the question presented, its precedent indicates it would likewise hold that a conviction like Esquivel-Quintana's falls within Section 1101(a)(43)(A). The Fifth Circuit has held that if statutes criminalizing sex with minors define "minor" as a person under eighteen, they "comport with the generic meaning of 'minor'" in Section 1101(a)(43)(A). *Contreras v. Holder*, 754

b. In direct contrast, an eleven-judge en banc panel of the Ninth Circuit unanimously held in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008), that convictions under Cal. Penal Code § 261.5(c) do not constitute "sexual abuse of a minor." *Id.* at 1160. The Ninth Circuit began by observing that federal law criminalizes consensual sex only when the minor is under sixteen and is at least four years younger than the defendant. *Estrada-Espinoza*, 546 F.3d at 1152 & n.2 (discussing 18 U.S.C. § 2243). The Ninth Circuit next observed that the Model Penal Code and the law in "the vast majority of states" also dictate that "consensual sexual intercourse with a 17-year-old . . . is not necessarily abusive under the ordinary, contemporary, and common meaning of 'abuse.'" *Id.* at 1153 (footnote omitted). Given the clarity with which all of these sources exclude sex between twenty-one-year-olds and persons almost eighteen from the generic meaning of "sexual abuse of a minor," the Ninth Circuit held that "*Chevron* deference does not apply." *Id.* at 1157 n.7. When "Congress has spoken directly to the issue, as it has here, our inquiry is over." *Id.*

After *Estrada-Espinoza*, the Ninth Circuit explained that its reference in that opinion to 18 U.S.C. § 2243's definition of "minor" as someone between twelve and sixteen was not intended to suggest that sexual abuse of someone *younger* than

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F.3d 286, 294 (5th Cir. 2014) (citing *United States v. Rodriguez*, 711 F.3d 541, 560 (5th Cir. 2013) (en banc)). It did not reach the question, however, whether a certain age differential is necessary for a state-law conviction to constitute an "aggravated felony" or, if so, what that differential would be. *Id.* at 295.

twelve does not constitute "sexual abuse of a minor" under the INA. *United States v. Medina-Villa*, 567 F.3d 507, 515-16 (9th Cir. 2009); *see also Restrepo*, 617 F.3d at 799 (noting that the Ninth Circuit "retreated" from any such suggestion). But the Ninth Circuit has never wavered from its position that consensual sex with someone *older* than sixteen cannot constitute the "aggravated felony" of "sexual abuse of a minor." To the contrary, the Ninth Circuit has repeatedly confirmed that the age maximum and age differential established in *Estrada-Espinoza* are elements of the generic definition of "sexual abuse of a minor." *See, e.g.*, *United States v. Martinez*, 786 F.3d 1227, 1231 (9th Cir. 2015); *United States v. Gomez*, 757 F.3d 885, 903-04 (9th Cir. 2014); *Rivera-Cuartas v. Holder*, 605 F.3d 699, 701 (9th Cir. 2010); *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1013 (9th Cir. 2009).

The Fourth Circuit also holds that the generic definition of "sexual abuse of a minor" excludes convictions under statutes like Cal. Penal Code § 261.5(c). In *United States v. Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013), the Fourth Circuit interpreted the phrase "sexual abuse of a minor" in the federal sentencing guidelines, which takes its definition from the INA. *Id.* at 381. *See* U.S.S.G. § 2L1.2 cmt. N.3(A) ("For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. 1101(a)(43)."). The Fourth Circuit (per Judge Wilkinson) reasoned that conduct that is "entirely lawful" under federal law and in the majority of states cannot be an "aggravated felony." *Id.* at 381. Citing *Estrada-Espinoza* approvingly, the Fourth Circuit thus determined that while "the word 'minor' may vary depending on legal context," the age

limit for minority "is sixteen for purposes" of the "aggravated felony" of "sexual abuse of a minor." *Id.* at 380.

Finally, Tenth Circuit law dictates that a conviction under Cal. Penal Code § 261.5(c) does not constitute "sexual abuse of a minor." *Id.* at 598-99. In *Rangel-Perez v. Lynch*, 816 F.3d 591 (10th Cir. 2016), issued after the Sixth Circuit's decision here, the Tenth Circuit addressed whether the generic offense of "sexual abuse of a minor" has a mens rea requirement. *Id.* at 597-98. In defining the generic elements of that offense, the Tenth Circuit followed the elements in 18 U.S.C. §§ 2241 and 2243. *Id.* at 604 (citing *Estrada-Espinoza* for support). Noting that the BIA interpretation of "sexual abuse of a minor" was derived from the witness protections that 18 U.S.C. § 3509 affords to children, the Tenth Circuit held it "would not defer" to the BIA's analysis because it makes "scant sense" to rely in this context on a "procedural statute" over others that "define a substantive criminal offense." *Id.* at 598-601 (quoting *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015)).

2. This conflict is ripe for review. Two terms ago, this Court denied certiorari in *Velasco-Giron*, which raised the issue presented here. *See* 135 S. Ct. 2072 (2015). The Government opposed review, noting that the BIA had just published its decision in this case and urging this Court to give the courts of appeals an opportunity to consider the effect of that decision. Brief in Opposition at 21-22, *Velasco-Giron v. Holder*, 135 S. Ct. 2072 (2015) (No. 14-745). It is now clear that the BIA's decision here is incapable of resolving the conflict.

a. Since the BIA issued its opinion here, the Sixth Circuit has deferred to the agency's interpretation of "sexual abuse of a minor," Pet. App. 2a, while the Tenth Circuit has rejected that interpretation as making "scant sense," *Rangel-Perez*, 816 F.3d at 601 (quoting *Mellouli*, 135 S. Ct. at 1989). Thus, the split over the meaning of 8 U.S.C. § 1101(a)(43)(A) has only deepened since the Government's request for forbearance.

b. More fundamentally, the BIA's decision itself renders the split incapable of resolution absent this Court's intervention. The BIA held that, "outside of the Ninth Circuit," convictions under state laws criminalizing sex between twenty-one-year-olds and persons almost eighteen constitute "sexual abuse of a minor." Pet. App. 35a. But inside the Ninth Circuit, the BIA itself has decided not to treat convictions like Esquivel-Quintana's as "sexual abuse of a minor." *Id.* Thus, under the BIA's own view of the law, the Ninth Circuit will not see any cases involving whether convictions under Cal. Penal Code § 261.5(c) or parallel laws constitute aggravated felonies under the INA.

Furthermore, even if the Ninth Circuit were again somehow confronted with this issue, no BIA decision could change its position. The Ninth Circuit (in its unanimous en banc decision) concluded that Section 1101(a)(43)(A) *unambiguously* excludes convictions like Esquivel-Quintana's. *Estrada-Espinoza*, 546 F.3d at 1157 n.7; *see also Velasco-Giron*, 773 F.3d at 777 (noting that the Ninth Circuit held that the BIA's position "flunks Step One of *Chevron*"). And when a court's construction "follows from the unambiguous terms of the statute," that

judicial construction "trumps" any future agency constructions to the contrary. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

II. The Question Presented Is Extremely Important, and This Case Is an Ideal Vehicle for Resolving It.

1. This Court has frequently granted certiorari to clarify the scope of generic offenses enumerated as "aggravated felonies" under the INA. *See, e.g.*, *Luna Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Kawashima v. Holder*, 132 S. Ct. 1166 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Here, too, resolving the conflict over the meaning of "sexual abuse of a minor" is vitally important for this country's millions of lawfully permanent residents and other noncitizens – as well as for courts, prosecutors, and criminal defense attorneys alike.

a. For lawful permanent residents such as Esquivel-Quintana, the import of whether a conviction constitutes an "aggravated felony" – thus subjecting them to "mandatory removal," *Moncrieffe*, 133 S. Ct. at 1692 – can hardly be overstated. "Deportation can be the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *see also Padilla v. Kentucky*, 559 U.S. 356, 365 (2010). It "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). These consequences are all the more serious for people – like Esquivel-

Quintana – who came here as children and now face permanent banishment from the country where they built their lives and their extended family resides.

Because the stakes are so "high and momentous," removal decisions should not depend upon "fortuitous and capricious" circumstances or subject noncitizens to "irrational" hazards. *Delgadillo*, 332 U.S. at 391. Yet the BIA and the courts of appeals here have created exactly this sort of irrational scheme: Noncitizens may suddenly become removable just by stepping across state lines. Esquivel-Quintana, for instance, was convicted of unlawful sexual intercourse in California but was not subject to removal as long as he continued to live there. Only when he moved to Michigan to be closer to his family did he become an "aggravated felon" – even though the conduct for which he was convicted is not even a crime in Michigan.

Given this crazy-quilt situation, noncitizens convicted under Cal. Penal Code § 261.5(c) and parallel state laws face serious restrictions on their freedom of mobility. They face a threat of removal if they live in, work in, or even visit thirteen states – including highly populated centers of commerce such as New York and Michigan.[3] But they are free to enter twenty other states.[4] They may reside or pass

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[3] The thirteen states are: Connecticut, Delaware, Illinois, Indiana, Kentucky, Michigan, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Vermont, and Wisconsin (in the Second, Third, Sixth, and Seventh Circuits).

[4] The twenty states are: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Maryland, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, South

through any of the other seventeen states at their own risk, depending on what an immigration judge or court may later decide.

b. Resolving the question presented is also necessary to give guidance to courts, prosecutors, and defense attorneys with regard to prosecutions involving sex with minors.

As noted above, seven states have laws criminalizing sexual intercourse between a twenty-one-year-old and someone under eighteen: Arizona, California, Idaho, North Dakota, Oregon, Virginia, and Wisconsin. *See* Pet. App. 67a-68a (collecting state statutes). In just one year in California alone, prosecutors filed almost 3,000 cases under its law regulating this and other forms of "statutory rape." Governor's Office of Criminal Justice Planning, *Statutory Rape Vertical Prosecution: Fourth Year Report* 3 (2000).

Resolving whether convictions under these statutes constitute "aggravated felonies" under the INA would enable prosecutors to make charging and plea bargaining decisions with full knowledge of the immigration consequences. Indeed, some states impose on prosecutors explicit statutory or ethical duties to consider the immigration consequences of potential plea agreements. *See, e.g.*, Cal. Penal Code § 1016.3(b); Va. State Bar Legal Ethics, Formal Op. 1876 (2015). Prosecutors cannot do that effectively against the current backdrop of uncertainty.

Carolina, Utah, Virginia, Washington, West Virginia, and Wyoming (in the Fourth, Ninth, and Tenth Circuits).

Defense attorneys also need clarity in this area. The categorical approach is designed partly to enable noncitizens "to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (internal quotation marks omitted). And defense counsel have a duty to advise clients as to which crimes are "aggravated felonies" and which are not. *See Padilla*, 559 U.S. at 367. Yet defense lawyers cannot provide that advice when the circuits are in disarray.

c. The question presented is also salient for the criminal justice system more widely. "Aggravated felony" convictions serve as predicates for federal criminal prosecutions and sentencing enhancements. For instance, noncitizens who illegally reenter the country may generally receive a two-year prison sentence, but noncitizens who have been convicted of "aggravated felonies" who reenter illegally may receive up to twenty years. 8 U.S.C. § 1326(b)(2); U.S. Sentencing Guidelines § 2L1.2 cmt. n.3(A) (2015). Noncitizens convicted of "aggravated felonies" are also subject to criminal sanctions if they disobey orders of removal, *see* 8 U.S.C. § 1253(a)(1), as are individuals who help "aggravated felon[s]" illegally enter the country, *id.* § 1327.

These criminal consequences arise frequently. Illegal reentry alone constitutes 26% of all federal criminal cases. U.S. Sentencing Comm'n, *Illegal Reentry Offenses* 8 (Apr. 2015). And approximately 7,500 federal criminal cases are brought every year against noncitizens convicted of aggravated felonies

for reentering the country. *Id.* at 8-9.[5] Courts need to know when these prosecutions are properly charged and when they are not.

2. This case is an excellent vehicle for resolving whether "sexual abuse of a minor" covers convictions such as Cal. Penal Code § 261.5(c). The question presented has been fully litigated at each stage in this proceeding. It has also yielded a precedential BIA opinion and a published Sixth Circuit opinion with a lengthy dissent. And the question presented is outcome determinative for Esquivel-Quintana.

III. The Sixth Circuit's Decision Is Incorrect.

The Sixth Circuit's holding – that Esquivel-Quintana's conviction constitutes "sexual abuse of a minor" under the INA – is incorrect. Regardless of whether *Chevron* applies, the first step in any statutory interpretation case is to determine whether the statute dictates a clear answer to the issue. Here, the generic federal definition of "sexual abuse of a minor" clearly excludes the least culpable conduct under Cal. Penal Code § 261.5(c) – consensual sex between a twenty-one-year-old and a person almost eighteen. So the Sixth Circuit's analysis should have ended there.

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[5] The Sentencing Commission has proposed an amendment to U.S. Sentencing Guidelines § 2L1.2 that would decouple the level of sentencing enhancements from the "aggravated" nature of the prior conviction. *See* 81 Fed. Reg. 27,262, 27,273 (May 5, 2016). Regardless of whether Congress approves this amendment, the definition of the term will remain critical in illegal reentry cases where the Government seeks a sentence enhancement exceeding ten years. *See* 8 U.S.C. § 1326(b)(1).

But even if the phrase "sexual abuse of a minor" were ambiguous as to whether it covers convictions under statutes like Cal. Penal Code § 261.5(c), it would not matter. This Court has never deferred to the BIA's generic definition of an "aggravated felony," and *Chevron* deference is clearly improper where, as here, an agency is interpreting a civil statute with criminal applications. Finally, even if *Chevron* deference were permissible in these circumstances, the BIA's interpretation is unreasonable and so it still would not be worthy of deference.

A. Interpretive Tools Clearly Dictate That Sex Between a Twenty-One-Year-Old and Someone Almost Eighteen Does Not Constitute "Sexual Abuse of a Minor."

A straightforward application of the categorical approach resolves this case. Under that approach, courts look to federal and state criminal laws, as well as the Model Penal Code, to determine the "generic" federal definition of the "aggravated felony" at issue. *Taylor v. United States*, 495 U.S. 575, 596-98 & n.8 (1990). According to each of these guides, as well as customary tools of statutory interpretation, the least of the acts criminalized under Cal. Penal Code § 261.5(c) is clearly not "sexual abuse of a minor."

1. Federal law, the vast majority of states, and the Model Penal Code all deem consensual sex between twenty-one-year-olds and persons under eighteen to be legal; only one state deems it "sexual abuse."

a. *Federal law.* 18 U.S.C. § 2243 contains the only definition of "sexual abuse of a minor" in the U.S. Code. That statute requires that a victim be

under sixteen years old and that the defendant be at least four years older. (A second statute, titled "aggravated sexual abuse" criminalizes sexual acts with anyone younger than twelve. *See* 18 U.S.C. § 2241(c).)

The Sixth Circuit deemed Section 2243 inappropriate as a guide for two reasons, but neither withstands scrutiny. First, the Sixth Circuit maintained that the BIA had permissibly looked to 18 U.S.C. § 3509 instead of Section 2243 to determine the meaning of "minor." Pet. App. 12a. But Section 3509 establishes "[c]hild victims' and child witnesses' rights" in court – for example, the right of child-abuse victims to testify via closed-circuit television. *See* 18 U.S.C. § 3509. It does not establish any crime or even define the word "minor." Section 2243's criminal prohibition, therefore, is the only pertinent provision of federal law here.

Second, the Sixth Circuit noted that, in contrast to other "aggravated felonies" listed in the INA that cross-reference particular federal criminal statutes, Section 1101(a)(43)(A)'s listing of "sexual abuse of a minor" does not cross-reference Section 2243. Pet. App. 14a. But the lack of a cross-reference is unremarkable. The meaning of "sexual abuse of a minor" does not derive exclusively from Section 2243. Rather, as with "murder," "rape," "burglary," "theft" and other crimes in the INA that are not defined by cross-reference, *see* 8 U.S.C.§§ 1101(a)(43)(A) & (G), "sexual abuse of a minor" is defined according to the "generic sense in which the term is now used" under federal law, state law, and the Model Penal Code, *Taylor*, 495 U.S. at 598. Section 2243 is simply the most relevant federal source for *that* inquiry.

b. *State law.* The restrictive definition of "sexual abuse of a minor" under federal criminal law is consistent with "the criminal codes of most States," *Taylor*, 495 U.S. at 598. While every state criminalizes sex between someone under sixteen and a person more than four years older, only seven states criminalize the least culpable conduct at issue here: sex between someone who is twenty-one and another who is almost eighteen. *See* Pet. App. 67a-68a (collecting state statues).

But even the number seven substantially overcounts the number of states that deem consensual sex between a twenty-one-year-old and someone under eighteen to be "sexual abuse." Within the seven states that criminalize that behavior, state law still typically reserves the label "abuse" to describe separate sex crimes where the offender holds a position of authority over the victim or the victim is younger than sixteen. Virginia, for example, considers a minor to be sexually "abused" only when his "parents" or someone else "responsible for his care" commits or facilitates the illegal sexual acts, Va. Code § 16.1-228.4, or the minor is under fifteen, *id.* 18.2-67.4:2. Arizona and North Dakota similarly limit their definition of "sexual abuse" to sexual contact with children younger than fourteen or fifteen, respectively. *See* Ariz. Rev. Stat. § 13-1417; N.D. Cent. Code § 12.1-20-03.1. California, Idaho and Wisconsin likewise limit their definition of "sexual abuse" to sex with someone who is under sixteen. Cal. Penal Code § 261.5(d) (cross-referenced in *id.* § 11165.1(a)); Idaho Code § 18-1506; Wis. Stat.

948.02(2) (cross-referenced in *id.* § 971.37(1)).[6] Lest there be any doubt, California has explicitly stated that it does *not* consider a sixteen-year-old who, as here, "voluntarily engages in sexual intercourse" to be a victim of "abuse." *In re Kyle F.*, 5 Cal. Rptr. 3d 190, 194 (Ct. App. 2003); *see also Opinion No. 83-911*, 67 Ops. Cal. Atty. Gen. 235 (1984) (same).

In fact, only *one* state appears to characterize consensual sex between someone almost eighteen and a person just three years older as " sexual abuse." *See* Or. Rev. Stat. § 163.415(1)(B). Under these circumstances, the notion that the generic definition of "sexual abuse of a minor" encompasses consensual sex between someone almost eighteen and a person just three years older is hard to fathom.

c. *The Model Penal Code.* Like the U.S. Code and the vast majority of state codes, the Model Penal Code's provision criminalizing sex with persons less than a certain age requires that the victim be under sixteen and at least four years younger than the defendant. *See* Model Penal Code § 213.3(1)(a) (Am. Law Inst. 1962). The least culpable conduct at issue here is perfectly legal under the Model Penal Code – and is certainly not any form of "abuse."

2. Surrounding language in the INA reinforces that "sexual abuse of a minor" does not cover consensual sex between a twenty-one-year-old and someone just shy of eighteen.

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[6] In California, the perpetrator must also be older than twenty-one. *See* Cal. Penal Code § 261.5(d) (cross-referenced in *id.* § 11165.1(a)).

First, it is vital to bear in mind that Congress has classified "sexual abuse of a minor" as an "aggravated felony," as opposed to a lesser transgression. This Court is "very wary" of defining "aggravated felony" in a manner that "the English language tells us not to expect." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 575 (2010) (internal quotation marks omitted). In *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), for example, the Court deemed it a "fundamental flaw" for the Government to argue that "even an undisputed misdemeanor [under federal law was] an aggravated felony." *Id.* at 1689.

The Sixth Circuit's position here is even more outlandish. Federal law *does not even criminalize* the least culpable conduct at issue. Nor do the vast majority of other states. And even among the seven states that criminalize the conduct, four demand it be charged as a misdemeanor.[7] Surely conduct that is *legal* in nearly all jurisdictions and a misdemeanor in most others cannot be an "aggravated felony."

Moreover, Congress's placement of the phrase "sexual abuse of a minor" alongside "murder" and "rape" underscores that it is meant to cover only grave and inhumane felonies, not the most expansive and technical restrictions on who may engage in consensual sex. Murder is so horrific that it is

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[7] *See* N.D. Cent. Code § 12.1-20-05.1; Or. Rev. Stat. § 163.415(2); Va. Code § 18.2-371(ii); Wis. Stat. § 948.09. Only Arizona and Idaho categorize the crime as a felony, *see* Ariz. Rev. Stat. § 13-1405; Idaho Code § 18-6101(2), and California allows it to be charged as a felony (as it was here) at the prosecutor's discretion, Cal. Penal Code § 261.5(c).

sometimes punishable by death. And this Court has recognized that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'" *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (citation omitted). That "sexual abuse of a minor" keeps company with these two serious offenses imbues the term with "more precise content," *United States v. Williams*, 553 U.S. 285, 294 (2008), and indicates that it is likewise meant to cover only truly abhorrent criminal conduct. Consensual sex between a twenty-one-year-old and someone barely three years younger does not rise to that level.

B. Even If the Statute Were Unclear, *Chevron* Deference Would Still Be Inappropriate Here.

Even if it were unclear whether Section 1101(a)(43)(A) covers convictions under Cal. Penal Code § 261.5(c), the Sixth Circuit's decision would still be incorrect.

1. This Court has never deferred to the BIA when using the categorical approach to formulate the generic definition of an "aggravated felony" listed in the INA. *See Luna Torres v. Lynch*, 136 S. Ct. 1619 (2016) (determining the generic definition of aggravated felonies described in the INA without reference to *Chevron*); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (same). *Compare also* Brief for Respondent at 45-49, *Nijhawan v. Holder*, 557 U.S. 29 (2009) (urging the Court to defer to the BIA's generic definition), *with Nijhawan v. Holder*, 557 U.S. 29 (2009) (interpreting statute without giving deference).

This makes sense. The BIA has no special expertise in defining generic crimes or applying other aspects of the categorical approach. At the same time,

the categorical approach "has a long pedigree in our Nation's immigration law" – predating *Chevron* by decades. *Moncrieffe*, 133 S. Ct. at 1685. It is designed to "promote efficiency, fairness, and predictability." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015). The categorical approach also accords with the "longstanding principle" – similar to the rule of lenity in the criminal context – "of construing any lingering ambiguities in deportation statutes in favor of the alien." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also Kawashima v. Holder*, 132 S. Ct. 1166, 1175-76 (2012) (noting practice of "construing ambiguities in deportation statutes in the alien's favor"). Therefore, when confronted with any "ambiguity" concerning the scope of the generic definition of an "aggravated felony," courts should simply apply the categorical approach so as to "err on the side of underinclusiveness." *Moncrieffe*, 133 S. Ct. at 1687, 1693.

The Sixth Circuit resisted resolving the case in this manner, suggesting that the categorical approach applies differently in immigration cases than in criminal cases. *See* Pet. App. 6a-7a. But the Sixth Circuit was clearly mistaken. This Court has made clear time and again that the categorical approach operates the same way – and leaves it to courts independently to ascertain the generic definition of crimes – in both contexts. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. ___ (2016) (slip op. at 8-9 n.2); *Moncrieffe*, 133 S. Ct. at 1684.

At any rate, as Judge Sutton explained in dissent below (Pet. App. 16a-27a), *Chevron* deference is plainly off-limits here because the particular provision of the INA at issue here, 8 U.S.C.

§ 1101(a)(43)(A), dictates not only civil consequences but criminal liability as well. *See supra* at 21. When construing a statute that imposes criminal liability, the rule of lenity requires courts to interpret ambiguity in favor of defendants. *Skilling v. United States*, 561 U.S. 358, 410 (2010). Federal agencies, in other words, have no license to resolve ambiguities in "criminal laws." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). And because courts "must interpret [a] statute consistently" whether they encounter it "in a criminal or noncriminal context," the rule of lenity must apply when interpreting statutes with criminal and civil consequences. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

The Sixth Circuit nevertheless applied *Chevron* instead of the rule of lenity here because it believed *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), required it to do so. Pet. App. 9a. The Sixth Circuit was mistaken. *Babbitt* involved a "facial challenge[]" to an administrative regulation that was on the books at the time of the conduct at issue. 515 U.S. at 704 n.18. Under those circumstances, this Court held that the regulation provided the "fair warning" the rule of lenity is designed to guarantee. *Id.*

Here, Esquivel-Quintana is not raising a facial challenge to any regulation, nor was there any clear BIA agency statement at the time of the conduct at issue. Furthermore, where ambiguous civil statutes carry criminal consequences, this Court has indicated in several cases in addition to *Leocal* that lenity (not *Chevron*) applies. *See, e.g.*, *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion); *Kasten v. Saint-Gobain*

Performance Plastic Corp., 563 U.S. 1, 16 (2011). If forced to choose between that case law and *Babbitt*, this Court should choose the former and hold the rule of lenity requires Section 1101(a)(43)(A) to be construed to exclude convictions under statutes such as Cal. Penal Code § 261.5(c).

2. Even if *Chevron* did apply, the BIA's interpretation would still not warrant deference because it is not "a reasonable construction" of the INA. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984). The BIA made three key errors in holding that Esquivel-Quintana's California conviction constitutes "sexual abuse of a minor."

First, as noted above, the BIA determined the elements of the generic crime of "sexual abuse of a minor" by looking to a witness-protection statute, 8 U.S.C. § 3509, rather than the definition of "sexual abuse of a minor" in the federal criminal code, 18 U.S.C. § 2243. *See supra* at 24-25. The categorical approach requires courts to seek guidance in comparable *criminal* laws, not procedural statutes.

Second, the BIA inverted the categorical approach in exactly the way this Court warned against in *Moncrieffe*. Under the categorical approach, a court "must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 133 S. Ct. at 1684 (internal quotation marks omitted and alterations in original). Nevertheless, in *Moncrieffe*, the Government complained that narrowly construing the INA's reference to drug trafficking would allow some

offenders unfairly to "avoid 'aggravated felony' determinations" because many are convicted under state laws covering wide ranges of conduct, some of which is quite serious. *Id.* at 1692-93. The Court responded that the Government's "objection to that underinclusive result [was] little more than an attack on the categorical approach itself." *Id.*; *see also Mathis v. United States*, 136 S. Ct. ___ (2016) (slip op. at 1, 7) (admonishing that "[f]or more than 25 years," and "in no uncertain terms," this Court has made clear that a state crime does not satisfy the categorical approach "if its elements are broader than those of a listed generic offense").

Here, the BIA committed the same error. Instead of identifying the least of the acts criminalized under Cal. Penal Code § 261.5(c), the BIA hypothesized particularly egregious conduct that might serve as a basis for conviction under the California law: "sexual intercourse between a 16-year-old high school student and his or her school teacher." Pet. App. 35a n.4. Because it believed that *that* conduct constitutes sexual abuse of a minor, the BIA held that *all* convictions under California's statute constitute "sexual abuse of a minor." *Id.* at 35a. This reasoning turns the categorical approach on its head.

Finally, the BIA contravened the categorical approach by adopting a geographically variable definition of "sexual abuse of a minor." The categorical approach requires "*uniform*, categorical definitions to capture all offenses of a certain level of seriousness." *Taylor*, 495 U.S. at 590 (emphasis added); *see also Moncrieffe*, 133 S. Ct. at 1693 n.11 (uniformity is the categorical approach's "chief concern"). The BIA flouted this principle, holding

that "outside of the Ninth Circuit," a violation of Cal. Penal Code § 261.5(c) is "sexual abuse of a minor," while inside the Ninth Circuit it is not. Pet. App. 35a. The BIA's holding thus sews into the INA the "odd result[]" that the categorical approach expressly rejects: A state-law conviction is an aggravated felony in some areas of the country but not others. *See Taylor*, 495 U.S. at 591. This is not only inequitable but also impermissible under this Court's precedent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 11, 2016

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUAN ESQUIVEL-QUINTANA, *Petitioner,* v. LORETTA E. LYNCH, Attorney General, *Respondent.*	No. 15-3101

On Petition for Review from an Order of the Board of Immigration Appeals.
No. A 047 719 438.

Decided and Filed: January 15, 2016

Before: BOGGS, SUTTON, and COOK, Circuit Judges.

COUNSEL

ARGUED: Michael Carlin, LAW OFFICE OF MICHAEL CARLIN PLLC, Ann Arbor, Michigan, for Petitioner. Yedidya Cohen, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent. **ON BRIEF:** Michael Carlin, LAW OFFICE OF MICHAEL CARLIN PLLC, Ann Arbor, Michigan, for Petitioner. Yedidya Cohen, UNITED

STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent. Sejal Zota, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, Boston, Massachusetts, Charles Roth, NATIONAL IMMIGRANT JUSTICE CENTER, Chicago, Illinois, Brian J. Murray, JONES DAY, Chicago, Illinois, Rajeev Muttreja, JONES DAY, New York, New York, for Amici Curiae.

BOGGS, J., delivered the opinion of the court in which COOK, J., joined, and SUTTON, J., joined in part. SUTTON, J., delivered a separate opinion concurring in part and dissenting in part.

OPINION

BOGGS, Circuit Judge. The Immigration and Nationality Act defines "sexual abuse of a minor" as an aggravated felony. 8 U.S.C. § 1101(a)(43)(A). Aliens convicted of an aggravated felony face numerous criminal and civil consequences, including removal from the United States. *Id.* § 1227(a)(2)(A)(iii). In this case, we consider whether "sexual abuse of a minor" includes convictions under California Penal Code § 261.5(c) for unlawful sexual intercourse with a minor. Because the Board of Immigration Appeals permissibly interpreted "sexual abuse of a minor" as including convictions under section 261.5(c), we defer to the Board's interpretation and deny Esquivel-Quintana's petition.

I

Juan Esquivel-Quintana was admitted to the United States as a lawful permanent resident in 2000. In 2009, he pleaded guilty to unlawful sexual intercourse with a minor in California. The statute under which he was convicted provides that "[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony." Cal. Penal Code § 261.5(c). Unlawful sexual intercourse is defined as "an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor," and a minor is "a person under the age of 18." *Id.* § 261.5(a). So, a twenty-year-old who has sex with a seventeen-year-old or a fifteen-year-old who has sex with a twelve-year-old could be convicted under the statute.

Subsequently, Esquivel-Quintana moved to Michigan. While he was in Michigan, the Department of Homeland Security initiated removal proceedings based on 8 U.S.C. § 1227(a)(2)(A)(iii), which states that an alien can be removed if he is convicted of an aggravated felony such as "sexual abuse of a minor," *id.* § 1101(a)(43)(A). An immigration judge ruled that Esquivel-Quintana's conviction under section 261.5(c) constituted "sexual abuse of a minor" and ordered him removed to Mexico. Esquivel-Quintana appealed.

A three-member panel of the Board of Immigration Appeals ruled against Esquivel-Quintana, concluding that "sexual abuse of a minor" includes convictions under section 261.5(c). *In re Esquivel-Quintana*, 26 I. & N. Dec. 469, 477 (B.I.A. 2015). First, the Board

stated that it would determine whether convictions under section 261.5(c) categorically constitute "sexual abuse of a minor" without looking at the specific facts of the case, such as Esquivel-Quintana's age or his victim's. *Id.* at 472. The Board did so based on *Taylor v. United States*, 495 U.S. 575 (1990), and *Descamps v. United States*, 133 S. Ct. 2276 (2013), which call for a categorical approach to assessing prior convictions in sentencing under the Armed Career Criminal Act. The Board went on to conclude that "sexual abuse of a minor" categorically encompassed convictions under section 261.5(c). The Board stated that "in the context of State statutory rape offenses, a statute that includes 16- or 17-year-olds must also contain a meaningful age differential to constitute 'sexual abuse of a minor.'" *Esquivel-Quintana*, 26 I. & N. Dec. at 475. The Board did not specify exactly what constitutes a "meaningful" age differential, but held that the age differential in California's statute – which requires an age gap of more than three years – was meaningful. Esquivel-Quintana now petitions for review of the Board's decision.

II

Chevron supplies the appropriate framework for reviewing the Board's interpretation of "sexual abuse of a minor." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court and Sixth Circuit have repeatedly held that *Chevron* deference applies to the Board's interpretations of immigration laws. *See Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); *id.* at 2214 (Roberts, C.J., concurring in the judgment); *Negusie v. Holder*, 555 U.S. 511, 516-17 (2009); *INS v.*

Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999); *Kellermann v. Holder*, 592 F.3d 700, 702 (6th Cir. 2010); *Singh v. Gonzales*, 451 F.3d 400, 403 (6th Cir. 2006). Several of our sister circuits have specifically applied *Chevron* in cases involving the Board's interpretation of "sexual abuse of a minor." *See Velasco-Giron v. Holder*, 773 F.3d 774, 776 (7th Cir. 2014); *Restrepo v. Attorney Gen. of the U.S.*, 617 F.3d 787, 796 (3d Cir. 2010); *Mugalli v. Ashcroft*, 258 F.3d 52, 60 (2d Cir. 2001).

Two circuits have reached a different conclusion. *Amos v. Lynch*, 790 F.3d 512, 518-20 (4th Cir. 2015); *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1156-58 (9th Cir. 2008) (en banc). But those decisions offer little guidance here. Neither *Amos* nor *Estrada-Espinoza* involved a published, precedential BIA opinion interpreting the relevant state statute. *Amos*, 790 F.3d at 518 ("However, the principles of *Chevron* deference are not applicable to the Board's decision in Amos's case because, although issued by a three-judge panel of the BIA, it was an unpublished decision that does not carry precedential weight."); *Estrada-Espinoza*, 546 F.3d at 1157 (noting that the BIA's decision was a "single-judge, unpublished, nonprecedential" decision). Here, conversely, we owe the BIA's precedential decision *Chevron* deference. *See Lockhart v. Napolitano*, 573 F.3d 251, 262 (6th Cir. 2009). Although *Amos* and *Estrada-Espinoza* could be read to suggest that courts may forego *Chevron* deference to *published* BIA precedents solely because they establish broad standards, that proposition is, as the Seventh Circuit recently noted, at odds with basic black-letter administrative law. *Velasco-Giron*, 773 F.3d at 779; *see also NLRB v. Bell Aerospace Co.*, 416

U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). There is not "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).

Generic-Definition Argument. Esquivel-Quintana is misguided in relying on *Taylor* for the proposition that we must ignore *Chevron* and create our own definition of "sexual abuse of a minor." *Taylor* involved the Armed Career Criminal Act, not the Immigration and Nationality Act. While it is true that both statutes attach consequences to certain prior convictions, there are important differences as well.

The generic-definition approach established in *Taylor* with respect to the crime of burglary is intimately connected with the Armed Career Criminal Act's legislative history. 495 U.S. at 581-87. The *Taylor* Court began by discussing the first version of the Armed Career Criminal Act, passed in 1984, which specifically defined "burglary" as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." *Id.* at 581. The Court then recounted how Congress deleted this definition, quoting extensively from committee hearing testimony and statements by members of Congress. *Id.* at 582-87. The Court concluded that "[t]he legislative history as a whole suggests that the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process," and on that basis adopted

a generic definition of burglary. *Id.* at 589-90. Given *Taylor*'s intimate connection with the Armed Career Criminal Act's legislative history, we decline to read *Taylor* as requiring us to adopt an identical approach to interpreting the phrase "sexual abuse of a minor," which was added to the Immigration and Nationality Act in 1996. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-627.

Rule of Lenity. Esquivel-Quintana argues that we should apply the rule of lenity and construe "sexual abuse of a minor" in his favor. According to the rule of lenity, when a criminal statue is ambiguous, that ambiguity must be resolved in the defendant's favor. While this case is civil in nature, Esquivel-Quintana contends that we should still apply the rule of lenity because the definition of "sexual abuse of a minor" has criminal applications.

The phrase "sexual abuse of a minor" is listed in 8 U.S.C. § 1101(a)(43)(A) as one of many crimes that constitute an aggravated felony. In addition to serving as a basis for removal, *id.* § 1227(a)(2)(A)(iii), an aggravated-felony conviction can also result in an enhanced sentence for aliens who are subsequently convicted of the crime of illegal reentry, *id.* § 1326(b)(2). The term aggravated felony is also used to define the crime of assisting certain inadmissible aliens with entering the United States illegally. *Id.* § 1327. Thus, the phrase "sexual abuse of a minor" has both civil and criminal applications.

An increasingly emergent view asserts that the rule of lenity ought to apply in civil cases involving statutes that have both civil and criminal applications.

See Whitman v. United States, 135 S. Ct. 352, 352-54 (2014) (Scalia, J., statement respecting denial of certiorari); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729-36 (6th Cir. 2013) (Sutton, J., concurring). This view is based on two principles. First, statutory terms should not have different meanings in different cases – "a statute is not a chameleon." *Carter*, 736 F.3d at 730. Second, ambiguous statutes must be construed in favor of defendants under the rule of lenity. The rule of lenity ensures that the public has adequate notice of what conduct is criminalized, and preserves the separation of powers by ensuring that legislatures, not executive officers, define crimes. Taken together, these two principles lead to the conclusion that the rule of lenity should apply in civil cases involving ambiguous statutes with criminal applications.

There are compelling reasons to apply the rule of lenity in such cases. Giving deference to agency interpretations of ambiguous laws with criminal applications would allow agencies to "create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman*, 135 S. Ct. at 353. Writing criminal laws is the legislature's prerogative, not the executive's. Furthermore, deferring to agency interpretations of criminal laws violates the principle that "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). Left unchecked, deference to agency interpretations of laws with criminal applications threatens a complete undermining of the Constitution's separation of powers.

Nonetheless, while this view is increasing in prominence, the Supreme Court has not made it the law. To the contrary, the Court has reached the opposite conclusion. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Court deferred to the Secretary of the Interior's definition of the term "take" in the Endangered Species Act of 1973, even though violations of the act could be enforced by criminal penalties. 515 U.S. 687, 703-04 (1995). The Court expressly considered and rejected the rule of lenity: "We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Id.* at 704 n.18.

Since then, the Supreme Court *has* suggested that the rule of lenity should apply in such cases. In *Leocal v. Ashcroft*, the Court omitted any discussion of *Chevron* in reviewing a Board of Immigration Appeals decision interpreting 8 U.S.C. § 1101(a)(43)(F). 543 U.S. 1, 8-13 (2004). That provision states that a conviction for a "crime of violence (as defined in section 16 of Title 18, but not including a purely political offense)" counts as an aggravated felony if it is punishable by at least one year of imprisonment. The Court held that "crime of violence" did not include the petitioner's Florida DUI conviction, and added in dicta in a footnote:

> Even if § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with § 16 in the deportation context, § 16 is a criminal statute,

> and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

Id. at 11 n.8. Similarly, in *Kasten v. Saint-Gobain Performance Plastic Corp.*, 131 S. Ct. 1325, 1336 (2011), and *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013), the Court suggested that the rule of lenity could apply if an ambiguity existed, but had no occasion to apply it because the statute was unambiguous.

While the Court has begun to distance itself from *Babbitt*, we do not read dicta in *Leocal* and subsequent cases as overruling *Babbitt*, or requiring that we apply the rule of lenity here in Esquivel-Quintana's civil removal proceeding. As an "inferior" court, our job is to adhere faithfully to the Supreme Court's precedents. The Supreme Court has said that we must follow *Chevron* in cases involving the Board's interpretations of immigration laws. *See Scialabba*, 134 S. Ct. at 2203 (plurality opinion); *id.* at 2214 (Roberts, C.J., concurring in the judgment); *Negusie*, 555 U.S. at 516-17; *Aguirre-Aguirre*, 526 U.S. at 424-25. This is not an "extraordinary" case. *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015). *Chevron* applies.

III

Under *Chevron*, we employ the traditional tools of statutory interpretation and ask whether the statute is ambiguous; if it is, we defer to the agency's permissible interpretations. As some have noted, a more elegant formulation of the inquiry might simply be: Has the agency permissibly interpreted the statute? *See, e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 & n.4 (2009); *Singh*, 451 F.3d at 403 ("We . . . defer to the BIA's reasonable interpretations of the INA." (quoting *Patel v. Gonzales*, 432 F.3d 685, 692 (6th Cir. 2005))); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 Va. L. Rev. 597 (2009).

The Board permissibly interpreted "sexual abuse of a minor" as including violations of California Penal Code § 261.5(c). When Congress used the ambiguous words "sexual abuse of a minor," it declined to specify a particular age of majority or age differential for statutory rape. Nowhere in the statute did Congress specify the definitions of "sexual abuse" or "minor." Congress left these questions open to interpretation by the Board of Immigration Appeals. *See Contreras v. Holder*, 754 F.3d 286, 293 (5th Cir. 2014) ("Here, there is no question that Congress has not directly spoken on the definition of sexual abuse of a minor.").

Faced with this ambiguity, the Board has interpreted "sexual abuse" by referring to the definition of the term in 18 U.S.C. § 3509(a)(8). *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 995-96 (B.I.A. 1999). That provision defines "sexual abuse" as "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist

another to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." Furthermore, the Board draws its definition of "minor" from 18 U.S.C. § 3509(a)(2), which defines a "child" as a person under eighteen. *In re V-F-D-*, 23 I. & N. Dec. 859, 862 (B.I.A. 2006). In choosing eighteen as the age of majority, the Board acknowledged the existence of a statute – 18 U.S.C. § 2243(a), titled "sexual abuse of a minor or ward" – that makes it a federal crime to have sex with a person who is less than sixteen years old, at least twelve years old, and at least four years younger than the perpetrator. *Id.* at 861-62. The Board declined to limit the meaning of "sexual abuse of a minor" to this particular definition, drawn from a different statute passed at a different time, because in its view "Congress intended to expand, rather than limit, the age at which a person is considered a minor." *Id.* at 862 n.7. The Board elaborated on its interpretation of "sexual abuse of a minor" in this case, holding that the phrase includes convictions under a state statutory-rape law that protects sixteen- and seventeen-year-old victims while also requiring a meaningful age differential between the perpetrator and the victim. *Esquivel-Quintana*, 26 I. & N. Dec. at 477.

Nothing forbids the Board's interpretation. Indeed, there are strong arguments that support it. As the Seventh Circuit has noted, multiple criminal provisions of the United States Code define a "minor" as a person under eighteen. *Velasco-Giron*, 773 F.3d at 775. For the crime of "sexual exploitation of children," "minor" is defined as any person under the age of eighteen. 18 U.S.C. §§ 2251, 2256(1). Eighteen is also the age of majority for the crime of transporting a

"minor" with intent to engage in criminal sexual activity. 18 U.S.C. § 2423(a). The Fifth Circuit has held that, as a matter of federal law under the Sentencing Guidelines, a "minor" in the phrase "sexual abuse of a minor" is a person under the age of eighteen. *United States v. Rodriguez*, 711 F.3d 541, 548 (5th Cir. 2013) (en banc). With so many sources defining the age of majority as eighteen, the Board's interpretation certainly qualifies as permissible.

Following the narrow definition of "minor" in § 2243(a) is neither compelled nor sensible. That statute applies only when the sexual-abuse victim is at least twelve years old. Victims younger than twelve are protected by a separate statute, § 2241(c), under the crime of "aggravated sexual abuse." Using § 2243(a) as the sole definer of "minor" would mean that abuse against an eleven-year-old does not constitute "sexual abuse of a minor." Furthermore, it would mean that a seventeen-year-old abusing a twelve-year-old has committed "sexual abuse of a minor," but a fifteen-year-old doing the same thing has not done so.

The age requirements of § 2243(a) were crafted with § 2241(c) in mind. Those two provisions were enacted side-by-side in the Sexual Abuse Act of 1986, Pub. L. No. 99-646, § 87 100 Stat. 3620, 3620-21, which came into effect ten years before the phrase "sexual abuse of a minor" was added to 8 U.S.C. § 1101(a)(43)(A) in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. at 3009–627. We should not haphazardly import the requirements of § 2243(a) into a completely different statute.

Congress could have included a cross-reference to § 2243(a) if it wanted to incorporate that definition of statutory rape. The Immigration and Nationality Act is replete with cross-references to federal statutes defining crimes that count as aggravated felonies. *See* 8 U.S.C. § 1101(a)(43)(B), (C), (D), (E), (F), (H), (I), (J), (K)(ii)-(iii), (L), (M)(ii), (N), (O), (P). When Congress declined to cross-reference a federal statute, it did so because it wanted to sweep in a broad array of state-law convictions. *Cf.* 8 U.S.C. § 1101(a)(43) ("The term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law . . . ."). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Importing word-for-word the statutory-rape requirements of § 2243(a) would be contrary to Congress's intent to allow state-law convictions to serve as grounds for removal.

The Second, Third, and Seventh Circuits all explicitly considered and rejected the argument that "sexual abuse of a minor" is limited to statutes that go no further than § 2243(a). The Second Circuit concluded that it is "unlikely in the extreme that Congress intended such a lowest common denominator result," and upheld the removal of an alien convicted under New York's statutory-rape law. *Mugalli*, 258 F.3d at 60. The Third Circuit stated that it would not "conjoin the meaning of words used in separate and distinct statutes," and upheld the removal of an alien convicted under New Jersey's "aggravated criminal

sexual contact" law. *Restrepo*, 617 F.3d at 794. The Seventh Circuit observed that the Board "must administer . . . 8 U.S.C. § 1101(a)(43)(A), not 18 U.S.C. § 2243(a)," and upheld the removal of an alien convicted under the precise California statute involved in this case. *Velasco-Giron*, 773 F.3d at 777. We join the Second, Third, and Seventh Circuits in rejecting the unwarranted adoption of § 2243(a), and hold that the Board permissibly interpreted "sexual abuse of a minor" as including convictions under California Penal Code § 261.5(c).

IV

If Congress had supplied its own definition of "sexual abuse of a minor" in 8 U.S.C. § 1101(a)(43)(A), this case would be easy. But Congress did not. That is why the Board of Immigration Appeals chose to interpret the phrase through case-by-case adjudication. Supreme Court and Sixth Circuit precedent require us to defer to the Board's interpretation if it is permissible.

The Board permissibly interpreted "sexual abuse of a minor" as encompassing convictions under California Penal Code § 261.5(c). Nothing in the statute forbids this interpretation. Esquivel-Quintana's petition is DENIED.

CONCURRING IN PART AND DISSENTING IN PART

SUTTON, Circuit Judge, concurring in part and dissenting in part. I agree with every part of the court's opinion but one: that a sentence from a footnote in a 1995 Supreme Court opinion requires us to apply *Chevron* deference, as opposed to the rule of lenity, to an agency interpretation of an ambiguous statute that has civil *and* criminal applications. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 794 n.18 (1995).

Let me start with our many areas of agreement.

Chevron permits agencies to fill gaps in *civil* statutes that Congress has delegated authority to the agency to interpret. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under the doctrine, courts presume that, when Congress leaves an ambiguity in an agency-administered statute, it intends the agency to fill the gap. *Id.* at 843-44.

But *Chevron* has no role to play in construing *criminal* statutes. In 227 years and counting, the federal courts have never presumed that, when an ambiguity arises in a criminal statute, the congressional silence signals that Congress wants an executive-branch agency to fill the gap. For all of the theories of *Chevron* that have filled the U.S. Reports and the Federal Reporter, to say nothing of the law journals, the idea that *Chevron* is a tool for construing criminal statutes has yet to make an appearance. That

is because criminal statutes "are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). The doctrine does not give the Department of Justice (or for that matter any other federal agency) *implied* gap-filling authority over ambiguous criminal statutes.

Otherwise, that would leave this distasteful combination: The prosecutor would have the explicit (executive) power to enforce the criminal laws, an implied (legislative) power to fill policy gaps in ambiguous criminal statutes, and an implied (judicial) power to interpret ambiguous criminal laws. *Cf.* The Federalist No. 47, at 297-99 (James Madison) (Clinton Rossiter ed., 1961). And it would permit this aggregation of power in the one area where its division matters most: the removal of citizens from society.

There may be good reason to debate the merits of *Chevron* today. *Compare* Philip Hamburger, Is Administrative Law Unlawful? (2014), *with* Adrian Vermeule, *No*, 93 Tex. L. Rev. 1547 (2015) (book review). But all can agree that, whatever the connection between ancient royal prerogatives and the like to modern agency law, *Chevron* has no role to play in the interpretation of criminal statutes.

The application of *Chevron* to criminal laws also would leave no room for the rule of lenity, a rule that resolves ambiguities in criminal statutes in favor of the individual and a rule of construction that Chief Justice Marshall described as "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). The rule "rests on concerns about notice (the state ought to provide fair warning of what violates the criminal

laws) and separation of powers (Congress, not agencies or courts, defines crimes)." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring).

So far so good.

But what happens when the same statute has criminal *and* civil applications? May Congress sidestep these requirements by giving criminal statutes a civil application? The answer is no. The courts must give dual-application statutes just one interpretation, and the criminal application controls. Statutes are not "chameleon[s]" that mean one thing in one setting and something else in another. *Id.* at 730. Because a single law should have a single meaning, the "lowest common denominator" – including all rules applicable to the interpretation of criminal laws – governs all of its applications. *Clark v. Martinez*, 543 U.S. 371, 380 (2005). That explains why *United States v. Thompson/Center Arms Co.* applied the rule of lenity to a civil tax case that turned on language that had civil and criminal applications. 504 U.S. 505, 517-18 & n.10 (plurality opinion); *id.* at 519 (Scalia, J., concurring in the judgment). Time, time, and time again, the Court has confirmed that the one-interpretation rule means that the criminal-law construction of the statute (with the rule of lenity) prevails over the civil-law construction of it (without the rule of lenity). When a single statute has twin applications, the search for the least common denominator leads to the least liberty-infringing interpretation. *See, e.g.*, *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011);

Clark, 543 U.S. at 380; *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 408–09 (2003).

The provision at issue in today's case is subject to the one-statute/one-interpretation rule because it has criminal and civil applications. The Immigration and Nationality Act makes a state or federal conviction for "sexual abuse of a minor" an "aggravated felony." 8 U.S.C. § 1101(a)(43)(A). The Act subjects aliens who have committed aggravated felonies (1) to civil consequences, most notably removal from the country, *id.* § 1227(a)(2)(A)(iii); *see also id.* § 1229b(a)(3), and (2) to criminal consequences, most notably increasing the maximum prison term for illegal reentry into the United States, *id.* § 1326(b)(2); *see also id.* § 1327.

The phrase "sexual abuse of a minor" is ambiguous as applied to the California law that Esquivel-Quintana violated. The state law prohibits sexual intercourse with anyone under eighteen, provided the perpetrator is not the victim's spouse and is more than three years older than the victim. Cal. Penal Code § 261.5(a), (c). The age requirement found in statutory-rape statutes like this one turns on the premise that those below a certain age generally cannot consent to sex. The ambiguity arises over when a "minor" can consent and when the sexual act ceases to be abusive. The minimum conduct criminalized by the California law involves seventeen-year-old victims. *Id.* § 261.5(a). Because the meaning of "sexual abuse of a minor" is a matter of federal law, the question is whether California's statutory-rape law includes these victims under a "'generic' federal definition." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

A division in the circuits over the point suggests this answer: maybe, maybe not. One court has concluded that the phrase includes statutory-rape convictions involving seventeen-year-old victims. *See, e.g.*, *Contreras v. Holder*, 754 F.3d 286, 294-96 (5th Cir. 2014). One court has said it does not. *E.g.*, *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1157 n.7, 1158–60 (9th Cir. 2008) (en banc). And at least one court isn't sure. *E.g.*, *Velasco-Giron v. Holder*, 773 F.3d 774, 776–78 (7th Cir. 2014).

The rest of the federal criminal code doesn't make things any easier. Title 18 includes a crime entitled "sexual abuse of a minor," a statutory-rape crime that requires the victim to be under *sixteen*. 18 U.S.C. § 2243(a). But it also includes protections for "child" victims of "sexual abuse" in a setting in which the legislature uses the terms "minor" and "child" interchangeably, *see id.* § 2251, and applies those protections to victims under *eighteen*, *id.* § 3509(a)(2), (8). As a matter of history, the term "minor" has always been a fluid concept. It referred to those under twenty-one at the founding. *See* 1 William Blackstone, Commentaries *463.

Adding to the ambiguity is the question of perspective – which of two ways the interpreter looks at the statute and how closely it ties the word "minor" to the term "sexual abuse." *Cf. United States v. Castleman*, 134 S. Ct. 1405, 1411-12 (2014); *id.* at 1420 (Scalia, J., concurring in part and concurring in the judgment). At one end, the word "minor" taken by itself might generally be said to refer to "[s]omeone who has not reached full legal age." Black's Law Dictionary 1147 (10th ed. 2014). The full legal age, the

"age of majority," is typically *eighteen* –at least in most instances today. *Id.* at 73. This approach led the Fifth Circuit and the Board of Immigration Appeals to conclude "sexual abuse of a minor" captures many statutory-rape crimes, with each State allowed to set an age (no higher than eighteen) below which minors generally cannot consent. *Contreras*, 754 F.3d at 294-96; *In re Esquivel-Quintana*, 26 I. & N. Dec. 469, 471 (B.I.A. 2015); *see also United States v. Rodriguez*, 711 F.3d 541, 559–62 (5th Cir. 2013) (en banc).

At the other end, a court might just as fairly focus on the reality that the word "minor" is tied to "sexual abuse" and statutory-rape laws. In that context, the word "minor" would not necessarily refer to "full legal age" but to the age at which a State no longer deems sex nonconsensual (and therefore abusive). *See* Black's Law Dictionary 1451. That age, the "age of consent," is typically *sixteen*. *Id.* at 73; *see United States v. Rangel-Castaneda*, 709 F.3d 373, 377 (4th Cir. 2013). This approach led the Ninth Circuit to decide that statutory-rape convictions amount to "sexual abuse of a minor" only if they require victims to be below the age of sixteen. *Estrada-Espinoza*, 546 F.3d at 1158. The Fourth Circuit took a similar approach when interpreting the same phrase in the Sentencing Guidelines. *Rangel-Castaneda*, 709 F.3d at 380-81.

Either reading has much to commend it, making the phrase ambiguous and making this a classic occasion for applying the rule of lenity. All clues considered, the phrase "sexual abuse of a minor" may, but may not, include convictions under California's § 261.5(c), and for that reason the rule of lenity should end the case in favor of the immigrant.

The application of *Chevron* to this ambiguity of course leads to a different result. A statute sufficiently ambiguous to invoke the rule of lenity assuredly is sufficiently ambiguous to trigger *Chevron* deference. And adjudicative decisions by the Board typically receive *Chevron* deference. *See, e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999). That means, as the court explains, that the Board's decision that Esquivel-Quintana's § 261.5(c) conviction amounts to "sexual abuse of a minor" prevails under *Chevron* deference. But it also means, as the court explains, that this interpretation would not prevail under the rule of lenity, where "sexual abuse of a minor" would cover no more than those statutory-rape crimes that set the age of consent at sixteen or less.

Yet the application of *Chevron* in this setting, as the court acknowledges, "threatens a complete undermining of the Constitution's separation of powers," while the application of the rule of lenity "preserves" them by maintaining the legislature as the creator of crimes. *Supra* at 5-6. Lenity also ensures fair notice of criminal consequences, precludes the same agency from altering criminal laws back and forth over time (even over conflicting judicial interpretations, *see Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-85 (2005), and even without input from Congress), and ensures that the same "[r]ules of interpretation bind all interpreters, administrative agencies included." *Carter*, 736 F.3d at 729, 731 (Sutton, J., concurring). Lenity also avoids several "uninvited oddities [that] arise if courts but not agencies must adhere to the rule of lenity." *Id.* at 732-33 (collecting some of them). By applying lenity in this setting, last of all, courts would

avoid *incentivizing* Congress to enact hybrid statutes that duck under lenity's imperatives, to say nothing of other imperatives in construing criminal laws.

Where I part ways with the court is over its conclusion that, even though the rule of lenity ought to control here, we must defer to the government's position under *Chevron* all the same.

The disagreement boils down to the meaning of one sentence in one footnote. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), involved a facial challenge to a regulation interpreting a provision of the Endangered Species Act that imposed both civil and criminal liability. *Id.* at 691-93. The Supreme Court decided it "owe[d] some degree of deference" to the Department of Labor's interpretation, *id.* at 703-04, and cited *Chevron* in the process. Then, in a footnote, it said that it "ha[d] never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Id.* at 704 n.18. This statement does not, as the court claims, require us to apply *Chevron*. If it did, the footnote would have (silently) overruled an entire line of cases that "hold that, if Congress wants to assign responsibility for crime definition to the executive, it must speak clearly." *Carter*, 736 F.3d at 734 (Sutton, J., concurring); *see, e.g.*, *United States v. Grimaud*, 220 U.S. 506, 519 (1911); *see also Touby v. United States*, 500 U.S. 160, 165-67 (1991). And the footnote expressly limits itself to "facial challenges," the sorts of claims that raise arguments – say that the regulation exceeded the agency's authority and thus was

unenforceable in all of its applications – that have no connection to the rule of lenity. Today's case does not involve a facial challenge.

Whatever this footnote and its inscrutable reference to facial challenges meant then, cases since *Babbitt* have not followed the reading the court finds itself constrained to follow. In one case, the Court declined to address how the rule of lenity applied in relation to *Chevron*, hardly necessary if *Babbitt* answered the question for cases that did not involve facial challenges to regulations. *See Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 & n.8 (2001). In another case, the Court concluded that the rule of lenity provided the rule of decision, hardly possible if the issue had been decided the other way. If a statute "has both criminal and noncriminal applications," the Court explained, the presence of ambiguity triggers the rule of lenity "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal*, 543 U.S. at 11 n.8. And in a concurrence from the denial of certiorari from a securities law case, two Justices agreed that "*Babbitt*'s drive-by" footnote "deserves little weight." *Whitman v. United States*, 135 S. Ct. 352, 354 (Scalia, J., statement respecting denial of certiorari, joined by Thomas, J.).

Perhaps something else gives the court pause today – the potential sticker shock of transforming a government-always-wins canon (*Chevron*) into a government-always-loses canon (rule of lenity). But that may not be where the Court's cases necessarily lead. The Court's recent cases, as shown, just *require*

two things: that the one-statute/one-interpretation rule governs dual-role statutes, and *Chevron* does not apply to that one interpretation. Those two requirements, however, may not dictate when the rule of lenity governs and when it does not. Yes, the rule of lenity frequently may dictate that one interpretation but that need not invariably be the case. Statutory "ambiguity" may mean one thing under *Chevron* and something else under the rule of lenity. If American Inuits have more than one way to describe snow, American lawyers may have more than one way to describe ambiguity. *See* Bill Bryson, The Mother Tongue 14-15 (2001). Under *Chevron*, courts will defer to an agency interpretation if the relevant statute "is silent or ambiguous with respect to the specific issue." 467 U.S. at 843. It remains to be seen whether the same type of ambiguity triggers the rule of lenity. *See, e.g., Huddleston v. United States*, 415 U.S. 814, 831 (1974). *Chevron*'s domain and the rule of lenity's domain thus may not necessarily overlap in some cases.

What matters for present purposes is that *Chevron* has no role to play in construing hybrid statutes. Whether the rule of lenity necessarily will provide the answer in all of these cases is another matter, one for the Court ultimately to decide. In some settings, it may turn out, the Court simply will apply the normal rules of construction unaided by a zero-sum default rule, and will look to the rule of lenity only in the kinds of interpretive disputes that require it.

One last point. An exception to *Chevron* for dual-role statutes would not be the least bit unusual. Deference under that rule is categorically unavailable,

the Supreme Court has held, in many settings: (1) agency interpretations of statutes the agency is not "charged with administering," *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997); (2) agency interpretations of "the scope of the judicial power vested by [a] statute," such as the availability of a private right of action, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990); *see Alexander v. Sandoval*, 532 U.S. 275, 288-91 (2001); (3) agency interpretations that result from procedures that were not "in the exercise" of the agency's authority "to make rules carrying the force of law," *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); (4) agency interpretations with respect to "extraordinary cases" where it is unlikely Congress "intended . . . an implicit delegation" to the agency, *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); and (5) agency interpretations of criminal statutes, *Abramski*, 134 S. Ct. at 2274. An exception for statutes with civil *and* criminal consequences fits easily alongside these exceptions and originates from the same place as the last one. Indeed, it is exceedingly difficult to understand how *Chevron* could prevail in a dual-statute case. Since the founding, it has been the job of Article III courts, not Article II executive-branch agencies, to have the final say over what criminal laws mean. I would honor that imperative here and reject the idea that Congress can end-run this principle by giving a criminal statute a civil application.

For these reasons, I concur with much of the court's reasoning but must disagree with its conclusion.

APPENDIX B

Matter of Juan ESQUIVEL-QUINTANA, Respondent

Decided January 9, 2015

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) For a statutory rape offense that may include a 16- or 17-year-old victim to be categorically "sexual abuse of a minor" under section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A) (2012), the statute must require a meaningful age differential between the victim and the perpetrator. *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), and *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006), clarified.

(2) The offense of unlawful intercourse with a minor in violation of section 261.5(c) of the California Penal Code, which requires that the minor victim be "more than three years younger" than the perpetrator, categorically constitutes "sexual abuse of a minor" and is therefore an aggravated felony under section 101(a)(43)(A) of the Act.

FOR RESPONDENT: Michael Carlin, Esquire, Ann Arbor, Michigan

FOR THE DEPARTMENT OF HOMELAND SECURITY: Heather A. Moilanen-Miller, Assistant Chief Counsel

BEFORE: Board Panel: PAULEY, GREER, and MALPHRUS, Board Members.

MALPHRUS, Board Member:

In a decision dated August 13, 2013, an Immigration Judge found the respondent removable as an alien convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (2012), denied his motion to terminate the proceedings, and ordered him removed from the United States. The respondent has appealed from that decision.[1] The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Mexico who was admitted to the United States on September 15, 2000, as a lawful permanent resident. In April 2009, he was charged with two counts of unlawful intercourse with a minor more than 3 years younger than he, in violation of section 261.5(c) of the California Penal Code. On May 28, 2009, he was convicted of one count, sentenced to 90 days in jail and 5 years of probation, and prohibited from having contact with the victim. The respondent was placed in removal proceedings following his conviction. The Immigration Judge determined that his conviction was

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[1] We have requested and received helpful supplemental briefing from both parties. In its supplemental brief, the Department of Homeland Security argues that the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), does not apply in immigration proceedings. However, we addressed and dismissed similar arguments in this regard in *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014).

for "sexual abuse of a minor," which is an aggravated felony under section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A) (2012).

II. ISSUE

The issue on appeal is whether the offense of unlawful intercourse with a minor in violation of section 261.5(c) of the California Penal Code, which requires that the minor victim be "more than three years younger" than the perpetrator, categorically constitutes "sexual abuse of a minor" and is therefore an aggravated felony under section 101(a)(43)(A) of the Act.

III. ANALYSIS

Section 261.5 of the California Penal Code provides, as it did at the time of the respondent's offense, that "[u]nlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor." It defines a "minor" as "a person under the age of 18 years." *Id.* Section 261.5(c) provides that "[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony." Thus, the elements of an offense under section 261.5(c) of the California Penal Code are (1) unlawful sexual intercourse (2) with a minor under 18 years old (3) who is more than 3 years younger than the perpetrator.

In *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 995-96 (BIA 1999), we determined the ordinary meaning of "sexual abuse" by referring to the definition of that term in 18 U.S.C. § 3509(a)(8) (1994),

which we found provided useful guidance on the crimes that can reasonably be considered "sexual abuse of a minor" for purposes of section 101(a)(43)(A) of the Act. The Federal statute defined "sexual abuse" as "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." 18 U.S.C. § 3509(a)(8). Our definition in *Matter of Rodriguez-Rodriguez* has been given deference by several circuit courts. *See, e.g., Restrepo v. Att'y Gen. of U.S.*, 617 F.3d 787, 795-96 (3d Cir. 2010); *Gaiskov v. Holder*, 567 F.3d 832, 835 (7th Cir. 2009); *Mugalli v. Ashcroft*, 258 F.3d 52, 57-60 (2d Cir. 2001).

Subsequently, in *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006), we held that a victim of sexual abuse who is under the age of 18 is a "minor" for purposes of section 101(a)(43)(A) of the Act. *See also United States v. Rodriguez*, 711 F.3d 541, 559-60 (5th Cir. 2013) (en banc) (adopting the age of 18 as the contemporary, generic meaning of a "minor" for sentencing guidelines purposes). Thus, we have deemed any relevant offense to be "sexual abuse of a minor" if it meets the definition of "sexual abuse" in *Matter of Rodriguez-Rodriguez* and the victim is under 18 years old, as required by *Matter of V-F-D-*. In this case, we must expand upon these decisions and consider whether a violation of a statute that involves unlawful sexual intercourse and presumes a lack of consent based on the age of the victim is "sexual abuse of a minor." Such an offense is commonly referred to as "statutory rape," which is "understood to mean the unlawful sexual

intercourse with a minor under the age of consent specified by state statute." *United States v. Gomez-Mendez*, 486 F.3d 599, 603 & n.7 (9th Cir. 2007) (citing *Black's Law Dictionary* 1288 (8th ed. 2004)).

We begin with relevant context. Previously, under *Matter of Lanferman*, 25 I&N Dec. 728 (BIA 2012), and other prior Board precedent, if an offense of conviction like the respondent's potentially involved removable conduct, we would employ the modified categorical approach to determine whether the particular crime qualified as "sexual abuse of a minor." In such a case, we would have looked to judicially recognized documents in the record of conviction to determine the actual age of the victim and the age differential between the victim and the offender, as well as any other relevant facts related to the conviction. *Id.*; *see also Shepard v. United States*, 544 U.S. 13, 26 (2005); *Taylor v. United States*, 495 U.S. 575, 602 (1990). However, following *Descamps v. United States*, 133 S. Ct. 2276 (2013), where the Supreme Court further discussed the application of the *Taylor* "modified categorical approach" and the definition of a "divisible" statute, we withdrew from *Matter of Lanferman* and announced that we would follow the law of each circuit as to divisibility. *Matter of Chairez*, 26 I&N Dec. 349, 354 (BIA 2014). Based on the Supreme Court's analysis in *Descamps* regarding the limited circumstances under which a statute is divisible and the absence of authority regarding divisibility in a statutory context relevant to this case in the United States Court of Appeals for the Sixth Circuit, we conclude that section 261.5(c) of the California Penal Code is not divisible as to the definition of sexual abuse of a minor.

Because we are therefore limited to applying the categorical approach, we may not look to any of the facts that form the basis of the conviction, including the ages of the victim and the offender. This is true even though the judicially recognized documents that were relied on to establish the conviction in the respondent's criminal proceedings are in the record and the facts are not in dispute. Accordingly, despite the inclusion of this uncontested information in the record, we may not consider the age of the victim or the actual age difference between the victim and the offender. Instead, we will look only to the minimum conduct that has a realistic probability of being prosecuted under the California statute. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013).[2]

The respondent argues that in applying this categorical analysis, the Board must hold that unlawful intercourse with a minor more than 3 years younger than the perpetrator in violation of section 261.5(c) of the California Penal Code is categorically not "sexual abuse of a minor" under section 101(a)(43)(A) of the Act. In support of his argument, he

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[2] We will further assume for these purposes that we are precluded from applying a "circumstance-specific" approach in relation to section 101(a)(43)(A) of the Act to determine the ages of the victim and the perpetrator and any age differential between them. In *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009), the Supreme Court upheld the application of the "circumstance-specific" approach to an offense that involved "fraud or deceit when the loss to the victim exceeds $10,000" under section 101(a)(43)(M)(i) of the Act but noted, albeit in dicta, that section 101(a)(43)(A) refers to the "generic crimes" of "murder, rape, or sexual abuse of a minor," which are subject only to the "categorical" approach.

relies on the Ninth Circuit's decision in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1159 (9th Cir. 2008), where the court concluded that the offense prohibited by section 261.5(c) is broader than the generic definition of "sexual abuse of a minor." According to the court, for a statute criminalizing statutory rape to define a "sexual abuse of a minor" offense, it may never include 16- or 17-year-olds as victims and it must require at least a 4-year age difference between the victim and perpetrator. *See id.* at 1152, 1158.[3] We are not bound by the Ninth Circuit's decision in these proceedings because the respondent's case arises in the Sixth Circuit, which, to our knowledge, has not opined on the definition of "sexual abuse of a minor" in this context. *See Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989).

The Seventh Circuit has recently addressed this issue and taken a different approach from *Estrada-Espinoza*. In *Velasco-Giron v. Holder*, 768 F.3d 723 (7th Cir. 2014), the court affirmed our determination that a violation of section 261.5(c) of the California Penal Code, the same statute under which the respondent was convicted, is "sexual abuse of a minor." The court explained that Congress gave the Board, as

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[3] Additionally, the Ninth Circuit has found that a statute proscribes "abuse" if it prohibits conduct that causes "'physical or psychological harm' in light of the age of the victim in question." *United States v. Medina-Villa*, 567 F.3d 507, 513 (9th Cir. 2009) (quoting *United States v. Baza-Martinez*, 464 F.3d 1010, 1015 (9th Cir. 2006)). However, we do not agree that sexual abuse requires any specific, identifiable harm. As discussed in *United States v. Diaz-Ibarra*, 522 F.3d 343, 350 (4th Cir. 2008), sexual abuse does not require injury because it may involve the use of a child for the gratification of an adult's sexual desires.

the administrative adjudicative authority, discretion on how to define "statutory rape of a minor" and that in making its determination that the statute prohibits "sexual abuse of a minor," the Board was entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Id.* at 726. It further noted that our holding in that case "flowed . . . from" the holding in *Matter of Rodriguez-Rodriguez*. *Id.* at 728 (internal quotation marks omitted).

Consistent with the Seventh Circuit's decision in *Velasco-Giron*, we hold that, outside of the Ninth Circuit, a violation of section 261.5(c) of the California Penal Code is categorically "sexual abuse of a minor." We do not agree with the Ninth Circuit that a "statutory rape" offense only qualifies as "sexual abuse of a minor" if the victim is under the age of 16. *See Rivera-Cuartas v. Holder*, 605 F.3d 699, 701-02 (9th Cir. 2010). Specifically, we are not prepared to hold that a 16- or 17-year-old categorically cannot be the victim of sexual abuse. We believe that sexual abuse of such a minor by an older person may occur in certain circumstances, and there is a realistic probability of prosecution for such abuse.[4]

"Central to the concept of 'statutory rape' is the notion that a person less than a certain age is legally incapable of giving consent and thus that statutory rape involves a sexual act committed by one partner

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[4] For example, sexual intercourse between a 16-year-old high school student and his or her school teacher is properly viewed as abusive, even if the conduct is consensual, because of the inherent coercive nature of the relationship and the potential for exploitation.

'against' the other." *Mugalli v. Ashcroft*, 258 F.3d at 58 n.6. There has been no consensus among the States on the exact age of consent for statutory rape. *See United States v. Rodriguez*, 711 F.3d at 561 n.26 (citing *United States v. Lopez-DeLeon*, 513 F.3d 472, 474 n.3 (5th Cir. 2008) (listing State statutes by the age of consent for statutory rape)). It is significant to our consideration of congressional intent, however, that a number of States defined 16- and 17-year-olds to be victims at the time Congress enacted this provision, as they continue to do. *See id.*; *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. at 996 (defining "sexual abuse of a minor" based on common usage, which encompassed various State crimes). We do not believe that Congress intended to exclude from the aggravated felony definition all State statutes that have defined sexual abuse of a minor, in part, by the victim being 16 or 17 years old.

In this regard, courts have recognized that "there is an inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity" because "[m]inors as a group have a less well-developed sense of judgment than adults, and thus are at greater peril of making choices that are not in their own best interests." *Gattem v. Gonzales*, 412 F.3d 758, 765 (7th Cir. 2005); *see also Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."). The Government's argument also relies on authority stating that teenaged women "may not have the negotiation skills needed to promote self-protective behavior during sexual encounters, particularly with

older, more experienced partners." Kim S. Miller et al., *Sexual Initiation with Older Male Partners and Subsequent HIV Risk Behavior Among Female Adolescents*, 29 Fam. Plan. Persp. 212, 214 (1997).

An age differential of a few years can be very significant when a minor is involved. As the Government argues, the risk of coercion is particularly great when the victim is not in the same peer group, and having an age differential of "more than three years" helps ensure that the victim and the perpetrator are not in the same peer group. *See* Kim S. Miller, *supra*, at 214 (classifying a woman's partner as not peer-aged if he is 3 or more years older because of the likelihood that they are in different school settings or, if in the same school, have a different status, such as freshman and senior).[5]

We recognize that there should be a distinction between sexual offenses involving older adolescents and those involving younger children when assessing whether consensual intercourse between peers is "abusive," and thus whether it would constitute "sexual abuse of a minor." *See United States v.*

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[5] Many courts, including the Ninth Circuit, have held that sexual offenses against children are "crimes of violence." *United States v. Medina-Villa*, 567 F.3d at 511-16; *see also, e.g., United States v. Ortiz-Delgado*, 451 F.3d 752, 757 (11th Cir. 2006); *Dos Santos v. Gonzales*, 440 F.3d 81, 84-85 (2d Cir. 2006); *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993). As the Eighth Circuit has explained, there is a substantial risk of violence in the course of committing a sexual offense against a young child "given the peculiar susceptibility of minors to coercion by adults into sexual acts." *United States v. Howard*, 754 F.3d 608, 610 (8th Cir. 2014) (quoting *United States v. Daye*, 571 F.3d 225, 234 (2d Cir. 2009) (internal quotation mark omitted)).

Medina-Villa, 567 F.3d 507, 514 (9th Cir. 2009). The statute must prohibit conduct that constitutes "sexual abuse" as that term is commonly used. *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. at 996. In this regard, we do not view an offense under a statute that may involve a 16- or 17-year-old victim, and that presumes a lack of consent, as categorically constituting sexual "abuse" without requiring an age differential. *See United States v. Osborne*, 551 F.3d 718, 720 (7th Cir. 2009) (noting that it is difficult to classify as "abusive" certain conduct prohibited by a State statute that imposes no age differential requirement but that makes it a crime for one teenager to engage in sexual contact with another, without committing a sexual act). In our view, an age differential is the key consideration in determining whether sexual intercourse with a 16- or 17-year-old is properly viewed as categorically "abusive." *See id.* at 720-21 (differentiating between sexual acts that are "abusive," because there is a significant age differential between the perpetrator and victim, and sexual acts that are not "abusive" because they occur between high school peers who are separated in age by, for example, only 2 years).

We continue to consider the term "minor" to be a victim under 18 years old for purposes of defining "sexual abuse of a minor" under section 101(a)(43)(A) of the Act. *Matter of V-F-D-*, 23 I&N Dec. at 862. However, we clarify that in the context of State statutory rape offenses, a statute that includes 16- or 17-year-olds must also contain a meaningful age differential to constitute "sexual abuse of a minor." At the same time, we emphasize that this holding is limited to sexual abuse statutes that may include 16-

or 17-year-olds as victims and do not make lack of consent an element of the offense. It also does not apply to other types of sexual crimes.[6]

In evaluating whether an offense is categorically one of "sexual abuse," we must carry out the congressional intent to impose immigration consequences on those who have been convicted of sexual abuse of a minor without including nonabusive consensual sexual intercourse between older adolescent peers. *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. at 996 ("Congress' intent [is] to remove aliens who are sexually abusive toward children and to bar them from any relief."). We are very limited in this regard because, in applying the categorical approach, we may not look to the actual age of the victim, the age differential between the parties, or any other facts, even if they are undisputed in the judicially recognized documents that underlie the conviction. While we do not agree that a specific age of minority is dispositive, we do believe that when a statute includes 16- or 17-year-olds and presumes a lack of consent, there must

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[6] Our holding today clarifies and refines our decision in *Matter of V-F-D-* because it applies to a conviction under a "statutory rape" statute that includes 16- and 17-year-olds as "minors." But it in no way undermines our conclusion that a "minor" is anyone under the age of 18 for purposes of determining whether sexual offenses, other than "statutory rape" including 16- and 17-year-old victims, qualify as "sexual abuse of a minor" offenses. *Cf. United States v. Gomez*, 757 F.3d 885, 903 (9th Cir. 2014) (defining "statutory rape" to require as an element that the victim be less than 16 years old). We also note that our holding in this case would not have led to a different outcome in *Matter of V-F-D-* because the Florida statute addressed there required at least a 7-year age differential between the perpetrator and the 16- or 17- year-old victim.

be a meaningful age differential for the offense to categorically constitute "abuse." *See United States v. Osborne*, 551 F.3d at 719-20.[7]

As we discussed in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. at 996, States "categorize and define sex crimes against children in many different ways." Therefore it is "difficult, if not impossible, to determine whether a majority consensus exists with respect to the element components of an offense category or the meaning of those elements." *United States v. Rodriguez*, 711 F.3d at 556. The same is true for the subset of sex crimes referred to as "statutory rape." *See id.* at 557. Statutory rape is not a common law crime, and "[m]any jurisdictions do not use the specific label 'statutory rape' in their codes." *Id.* at 557, 559.

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[7] It is noteworthy that our application of section 261.5(c) of the California Penal Code is not limited to 16- and 17-year-old victims. If we were to conclude that the offense at issue here is not categorically "sexual abuse of a minor," sexual offenders who were prosecuted under this statute for victimizing children under the age of 16 would not be removable for having committed a "sexual abuse of a minor" aggravated felony under the Act. In other words, a conviction under this statute would never constitute a "sexual abuse of a minor" aggravated felony conviction under the Act. This is so because we cannot consider the age of the victim under the categorical approach and section 261.5(c) may involve a 16- or 17-year-old victim, but it also includes victims under the age of 16. Similarly, in the Ninth Circuit, where we are bound to apply that circuit's law, the definition of sexual abuse of a minor is based exclusively on a Federal statute that only applies to victims aged 12 to 15. *See Velasco-Giron v. Holder*, 768 F.3d at 726-27. Thus, an alien who victimizes a child under 12 years old, but who is prosecuted under section 261.5(c), is not removable in the Ninth Circuit as an alien convicted of "sexual abuse of a minor" under section 101(a)(43)(A) of the Act. *Id.*

Most States have multiple provisions governing this type of offense and vary widely in both the extent and existence of age gaps. *United States v. Gomez*, 757 F.3d 885, 906 n.21 (9th Cir. 2014). States also differ as to strict liability versus the application of a mens rea defense. *United States v. Rodriguez*, 711 F.3d at 557. Accordingly, given the large number and variety of statutes that are potentially at issue under section 101(a)(43)(A) of the Act, even in the context of sexual offenses that presume a lack of consent, we must, as a practical matter, evaluate statutes individually and define "sexual abuse of a minor" under the Act on a case-by-case basis. *See Velasco-Giron v. Holder*, 768 F.3d at 728-29 (stating that when an agency addresses topics through adjudication, it may proceed incrementally); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999).

As discussed above, for a statutory rape offense involving a 16- or 17-year-old victim to be categorically "sexual abuse of a minor" under section 101(a)(43)(A) of the Act, the statute must require a meaningful age difference between the victim and the perpetrator. Section 261.5(c) of the California Penal Code requires that the minor victim be "more than three years younger" than the perpetrator, and we conclude that this is a sufficient age differential for the offense to qualify as "sexual abuse of a minor." This standard best protects the victim while ensuring that the offense under the statute we consider in a categorical manner actually constitutes "abuse" as that term is commonly used.

IV. CONCLUSION

We conclude that the crime of unlawful intercourse with a minor in violation of section 261.5(c) of the California Penal Code categorically constitutes "sexual abuse of a minor" and is an aggravated felony under section 101(a)(43)(A) of the Act. Consequently, the respondent's California conviction under section 261.5(c) renders him removable under section 237(a)(2)(A)(iii) of the Act. Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

APPENDIX C

No. 15-3101

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,

Respondent.

FILED
Apr 12, 2016
DEBORAH S. HUNT,
Clerk

ORDER

BEFORE: BOGGS, SUTTON, and COOK, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

18 U.S.C. § 2241

§ 2241. Aggravated sexual abuse

(a) **By force or threat.** – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly causes another person to engage in a sexual act –

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) **By other means.** – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly–

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby–

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With children. – Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) State of mind proof requirement. – In a prosecution under subsection (c) of this section, the

Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

18 U.S.C. § 2243

§ 2243 Sexual abuse of a minor or ward

(a) **Of a minor.** – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who –

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) **Of a ward.** – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who is –

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(c) **Defenses.** –

(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) **State of mind proof requirement.** – In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew–

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

18 U.S.C. § 3509

§ 3509. Child victims' and child witnesses' rights

(a) Definitions. – For purposes of this section –

(1) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;

(2) the term "child" means a person who is under the age of 18, who is or is alleged to be –

(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or

(B) a witness to a crime committed against another person;

(3) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(4) the term "physical injury" includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(5) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;

(6) the term "exploitation" means child pornography or child prostitution;

(7) the term "multidisciplinary child abuse team" means a professional unit composed of

representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;

(8) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(9) the term "sexually explicit conduct" means actual or simulated–

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse;

(10) the term "sex crime" means an act of sexual abuse that is a criminal act;

(11) the term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and

(12) the term "child abuse" does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

(b) Alternatives to live in-court testimony.–

(1) Child's live testimony by 2-way closed circuit television.–

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 7 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(B) The court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

(i) The child is unable to testify because of fear.

(ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.

(iii) The child suffers a mental or other infirmity.

(iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(C) The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on an individual child of one or more of the factors described in subparagraph (B) is so substantial as to justify an order under subparagraph (A), the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present.

(D) If the court orders the taking of testimony by television, the attorney for the Government and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the child during the child's testimony are—

(i) the child's attorney or guardian ad litem appointed under subsection (h);

(ii) persons necessary to operate the closed-circuit television equipment;

(iii) a judicial officer, appointed by the court; and

(iv) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

(2) Videotaped deposition of child. –

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

(B)(i) Upon timely receipt of an application described in subparagraph (A), the court shall

make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:

(I) The child will be unable to testify because of fear.

(II) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.

(III) The child suffers a mental or other infirmity.

(IV) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(ii) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (i), the court shall order that the child's deposition be taken and preserved by videotape.

(iii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are –

(I) the attorney for the Government;

(II) the attorney for the defendant;

(III) the child's attorney or guardian ad litem appointed under subsection (h);

(IV) persons necessary to operate the videotape equipment;

(V) subject to clause (iv), the defendant; and

(VI) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant represented pro se, be excluded from the room in which the deposition is conducted. If the court orders that the defendant be excluded from the deposition room, the court shall order that 2-way closed circuit television equipment relay the defendant's image into the room in which the child is testifying, and the child's testimony into the room in which the defendant is viewing the proceeding, and that the defendant be provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition.

(v) **Handling of videotape.** – The complete record of the examination of the child, including the image and voices of all persons who in any way participate in the examination, shall be made and preserved on video tape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and the defendant's attorney during ordinary business hours.

(C) If at the time of trial the court finds that the child is unable to testify as for a reason described in subparagraph (B)(i), the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at the trial. The court shall support a ruling under this subparagraph with findings on the record.

(D) Upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting the order.

(E) In connection with the taking of a videotaped deposition under this paragraph, the court may enter a protective order for the purpose of protecting the privacy of the child.

(F) The videotape of a deposition taken under this paragraph shall be destroyed 5 years after

the date on which the trial court entered its judgment, but not before a final judgment is entered on appeal including Supreme Court review. The videotape shall become part of the court record and be kept by the court until it is destroyed.

(c) **Competency examinations.** –

(1) Effect on Federal Rules of Evidence. – Nothing in this subsection shall be construed to abrogate rule 601 of the Federal Rules of Evidence.

(2) Presumption. – A child is presumed to be competent.

(3) Requirement of written motion. – A competency examination regarding a child witness may be conducted by the court only upon written motion and offer of proof of incompetency by a party.

(4) Requirement of compelling reasons. – A competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist. A child's age alone is not a compelling reason.

(5) Persons permitted to be present. – The only persons who may be permitted to be present at a competency examination are –

(A) the judge;

(B) the attorney for the Government;

(C) the attorney for the defendant;

(D) a court reporter; and

(E) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.

(6) **Not before jury.** – A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.

(7) **Direct examination of child.** – Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

(8) **Appropriate questions.** – The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.

(9) **Psychological and psychiatric examina-tions.** – Psychological and psychiatric examin-ations to assess the competency of a child witness shall not be ordered without a showing of compelling need.

(d) **Privacy protection.** –

(1) Confidentiality of information. –

(A) A person acting in a capacity described in subparagraph (B) in connection with a criminal proceeding shall –

(i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and

(ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

(B) Subparagraph (A) applies to –

(i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the Government to provide assistance in the proceeding;

(ii) employees of the court;

(iii) the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding; and

(iv) members of the jury.

(2) Filing under seal. – All papers to be filed in court that disclose the name of or any other information concerning a child shall be filed

under seal without necessity of obtaining a court order. The person who makes the filing shall submit to the clerk of the court –

(A) the complete paper to be kept under seal; and

(B) the paper with the portions of it that disclose the name of or other information concerning a child redacted, to be placed in the public record.

(3) **Protective orders.** –

(A) On motion by any person the court may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the proceedings, if the court determines that there is a significant possibility that such disclosure would be detrimental to the child.

(B) A protective order issued under subparagraph (A) may –

(i) provide that the testimony of a child witness, and the testimony of any other witness, when the attorney who calls the witness has reason to anticipate that the name of or any other information concerning a child may be divulged in the testimony, be taken in a closed courtroom; and

(ii) provide for any other measures that may be necessary to protect the privacy of the child.

(4) **Disclosure of information.** – This subsection does not prohibit disclosure of the name of or other information concerning a child

to the defendant, the attorney for the defendant, a multidisciplinary child abuse team, a guardian ad litem, or an adult attendant, or to anyone to whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child.

(e) Closing the courtroom. – When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. Such an order shall be narrowly tailored to serve the Government's specific compelling interest.

(f) Victim impact statement. – In preparing the presentence report pursuant to rule 32(c) of the Federal Rules of Criminal Procedure, the probation officer shall request information from the multidisciplinary child abuse team and other appropriate sources to determine the impact of the offense on the child victim and any other children who may have been affected. A guardian ad litem appointed under subsection (h) shall make every effort to obtain and report information that accurately expresses the child's and the family's views concerning the child's victimization. A guardian ad litem shall use forms that permit the child to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability.

(g) Use of multidisciplinary child abuse teams. –

(1) In general. – A multidisciplinary child abuse team shall be used when it is feasible to do so. The court shall work with State and local governments that have established multidisciplinary child abuse teams designed to assist child victims and child witnesses, and the court and the attorney for the Government shall consult with the multidisciplinary child abuse team as appropriate.

(2) Role of multidisciplinary child abuse teams. – The role of the multidisciplinary child abuse team shall be to provide for a child services that the members of the team in their professional roles are capable of providing, including –

(A) medical diagnoses and evaluation services, including provision or interpretation of x-rays, laboratory tests, and related services, as needed, and documentation of findings;

(B) telephone consultation services in emergencies and in other situations;

(C) medical evaluations related to abuse or neglect;

(D) psychological and psychiatric diagnoses and evaluation services for the child, parent or parents, guardian or guardians, or other caregivers, or any other individual involved in a child victim or child witness case;

(E) expert medical, psychological, and related professional testimony;

(F) case service coordination and assistance, including the location of services available from public and private agencies in the community; and

(G) training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses.

(h) **Guardian ad litem.** –

(1) **In general.** – The court may appoint, and provide reasonable compensation and payment of expenses for, a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

(2) **Duties of guardian ad litem.** – A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) A

guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

(3) **Immunities.** – A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in paragraph (2).

(i) **Adult attendant.** – A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.

(j) **Speedy trial.** – In a proceeding in which a child is called to give testimony, on motion by the attorney for the Government or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall, consistent with these

rules, expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.

(k) Stay of civil action. – If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

(l) Testimonial aids. – The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.

(m) Prohibition on reproduction of child pornography. –

(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain

in the care, custody, and control of either the Government or the court.

(2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.

(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

APPENDIX E

COMPILATION OF STATE LAWS CRIMINALIZING SEX WITH PERSONS YOUNGER THAN SPECIFIED AGES

1. In thirty-two states and the District of Columbia, it is legal to have consensual sex with someone who is 16- or 17-years-old. *See* Ala. Code § 13A-6-62; Alaska Stat. §§ 11.41.436; Ark. Code § 5-14-127; Conn. Gen. Stat. §§ 53a-71; D.C. Code §§ 22-3001(3), 3008; Ga. Code § 16-6-3; Haw. Rev. Stat. § 707-730; Ind. Code § 35-42-4-9; Iowa Code § 709.4; Kan. Stat. § 21-5506; Ky. Rev. Stat. § 510.060; 17-A Me. Rev. Stat. § 254; Md. Code Crim. Law § 3-308; Mass. Gen. Laws. ch. 265, § 23; Mich. Comp. Laws § 750.520d; Minn. Stat. §§ 609.342-45; Miss. Code § 97-3-65; Mont. Code § 45-5-501, -503; Neb. Rev. Stat. § 28-319.01; Nev. Rev. Stat. § 200.366; N.H. Rev. Stat. § 632-A:3(A)(II); N.J. Stat. § 2C:14-2(c)(4); N.M. Stat. § 30-9-11; N.C. Gen. Stat. § 14-27.30; Ohio Rev. Code § 2907.04; 21 Okla. Stat. §§ 45-1111, -1112, -1114, -1116; 18 Pa. Cons. Stat. §§ 3122.1; R.I. Gen. Laws § 11-37-6 to -7; S.C. Code § 16-3-655; S.D. Codified Laws §§ 22-22-1; 13 Vt. Stat. § 3252; Wash. Rev. Code § 9A.44.079; W. Va. Code § 61-8B-5.

2. In seven other states, it is legal to have sex with a 17-year-old (but not necessarily a 16-year-old). *See* Colo. Rev. Stat. § 18-3-402 (e); 720 Ill. Comp. Stat. 5/11-1.60; La. Rev. Stat. § 14:80; Mo. Rev. Stat. § 566.034; N.Y. Penal Law § 130.05; Tex. Penal Code § 22.011; Wyo. Stat. § 6-2-316.

3. In four other states, it is legal to have sex with a 17-year-old if the older person is younger than 24 or less than four years older. *See* 11 Del. Code § 770(a)(2) (crime only if defendant is over 30); Fla.

Stat. § 794.05(1) (requiring defendant to be over 24); Tenn. Code § 39-13-506 (requiring four-year age difference); Utah Code § 76-5-401.2 (requiring seven-year age difference).

4. In the seven remaining states, it is illegal for a 21-year old to have sex with someone almost eighteen. *See* Ariz. Rev. Stat. § 13-1405; Cal. Penal Code § 261.5; Colo. Rev. Stat. § 18-3-404(1.5); Idaho Code § 18-6101(2); N.D. Cent. Code §§ 12.1-20-05.1, 14-10-01; Or. Rev. Stat. §§ 163.315 & .415; Va. Code §§ 1-207, 18.2-371; Wis. Stat. §§ 948.01 & .09.